

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

CHARLES TIPTON, et al.,
Plaintiffs,
vs.
UNION TANK CAR COMPANY,
Defendant.

EXCERPT TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE THOMAS A. VARLAN

Monday, March 5th, 2018

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1 (A portion of the trial was had but not
2 requested to be transcribed.)

3 (The following excerpt of the trial
4 proceedings was had on March 5, 2018:)

5 (The witness was thereupon duly sworn.)

6 THE COURTROOM DEPUTY: Have a seat, please.

7 Will you state and spell your name for the
8 record.

9 THE WITNESS: My name is William R.

11:43AM 10 Constantino, C-o-n-s-t-a-n-t-i-n-o.

11 THE COURTROOM DEPUTY: Thank you, sir.

12 WILLIAM R. CONSTANTINO,

13 having been first duly sworn, was examined and
14 testified as follows:

15 DIRECT EXAMINATION

16 BY MR. FLEMING:

17 Q. I'll let you get some water first.

18 A. Yes, sir, if I could.

19 Q. Mr. Constantino, will you please state your
11:44AM 20 name.

21 A. William R. Constantino.

22 Q. Where are you employed?

23 A. With Union Tank Car Company in Chicago,
24 Illinois.

25 Q. In what capacity, sir?

1 A. I am the president of the North American
2 Rail Leasing Group. That covers both Union Tank Car
3 Company in the United States, as well as Procor in
4 Canada.

5 With respect to Union Tank Car Company, I'm
6 the general manager of the leasing business unit.

7 Q. How long have you worked for Union Tank Car
8 Company?

9 A. 40 years as of January of this year.

11:44AM 10 Q. Mr. Constantino, before we further
11 introduce you and the company, I wanted to address a
12 few topics that are likely at the front of the
13 jury's mind.

14 The jury's heard that the last time the
15 tank car was in Union Tank Car's possession was when
16 it was qualified in 2013. Can you explain to the
17 jury, what is the qualification?

18 A. Qualification is a mandated inspection. It
19 looks at the car from top to bottom, from end to
11:45AM 20 end, makes sure that the car conforms to structural
21 integrity requirements, that its fittings are in
22 operation and good condition, and that all the
23 wheels and axles, bearings, couplers, running gear,
24 as it's called in the industry, is in sound
25 operating condition and conforms to the regulations.

1 Q. So we inspect -- Union Tank Car inspects it
2 from stem to stern and top to bottom?

3 A. Yes, sir.

4 Q. How often is qualification required?

5 A. The interval for qualification is 10 years.

6 Q. What does qualification accomplish or what
7 is it intended to accomplish?

8 A. It is to ensure, as I said, the structural
9 integrity of the tank and to ensure that in all
10 respects the railcar is in compliance with the rules
11 before it returns to service.

12 Q. As part of the process, does Union Tank Car
13 follow certain rules to determine whether it can be
14 qualified?

15 A. Yes, sir.

16 Q. What are those rules?

17 A. It is a mandate from the Code of Federal
18 Regulations, 49 C.F.R., part 180, specifically calls
19 out that hazardous material tank cars should undergo
20 qualification. And then beyond that, you have
21 certain rules established by the American
22 Association of American Railroads, Rule 88.b, Rule
23 36.

24 Q. And does Rule 36 -- we've heard a lot of
25 testimony about Rule 36. Does Rule 36 set forth

1 when a roller bearing must be removed from service?

2 A. It does.

3 Q. And is Rule 36 contained within the field
4 manual of AAR interchange rules?

5 A. It is.

6 Q. Now, everyone agrees, including the
7 plaintiffs' expert, Mr. Whelan, that Rule 36 was
8 complied with here.

9 Other than Rule 36, is there any other rule
10 Union Tank Car is required to observe with respect
11 to the roller bearings?

12 A. Not that I'm aware of, no.

13 (Defendant's Exhibit 111 was
14 marked/received into evidence.)

15 BY MR. FLEMING:

16 Q. I want to show what's been marked as Union
17 Tank Car Exhibit -- or Defendant's Exhibit 111, to
18 which there is no objection, and we've drawn out
19 field service manual Rule 36. And does Rule 36,
20 Mr. Constantino, identify the causes of removal or
21 causes for removal for journal roller bearings?

22 A. It does.

23 Q. And is part 3 the section of the rule that
24 defines the guidelines under which we inspect the
25 bearing?

1 A. It does.

2 Q. Could you just describe for the jury what
3 part 3 requires during a Rule 36 inspection.

4 A. Well, you are to, in effect, rotate the
5 bearing and listen and feel for any disturbance that
6 would give indication of an internal problem with
7 the bearing.

8 Q. And are -- repair shop inspectors and
9 technicians would follow this rule and do this
11:48AM 10 particular inspection and look for the conditions
11 during the Rule 88 qualification inspection?

12 A. Yes, as part of Rule 88.b, you do have to
13 inspect various aspects of running gear componentry,
14 the truck's wheels. You do a visual inspection to
15 begin with on the bearings themselves looking for
16 any visible signs of distress and then proceed, as
17 allowed, to do that rotation exam that I discussed.

18 (Defendant's Exhibit 14 was
19 marked/received into evidence.)

11:48AM 20 BY MR. FLEMING:

21 Q. Speaking of the inbound inspection, I want
22 to next show Defendant's Exhibit 14, to which there
23 is no objection.

24 What is the form we have up in front of you
25 right now, the RES-82-2?

1 A. This is an internal UTC document that we
2 use, and we put it in the hands of our inspector,
3 the initial person that overviews the condition of
4 the car after it's been received at one of our
5 repair shops, and it's a checklist of things that
6 they have to go through and look at and ascertain
7 conditions.

8 Q. And is this the inbound inspection form
9 from the 2013 qualification?

11:49AM 10 A. Yes, sir.

11 Q. I want to draw your attention to line No.
12 17. What does line No. 17 reflect from this inbound
13 inspection?

14 A. That the inbound inspector overviewed all
15 the bearings on the car in his walk-around of the
16 car and his inspection.

17 Q. And were any -- was there any significance
18 that the boxes were left blank?

19 A. Well, that's indicative of no issues or
11:50AM 20 defects being found. There is a notation at the
21 bottom of each of these forms for the absence of
22 doubt; so everybody who looks at the document
23 understands that if there is no notation, no defect
24 was noted.

25 Q. And is that the last time the bearings

1 would be reviewed?

2 A. Well, once the car was put back into
3 service, it was reviewed by any number of folks.

4 Q. Now, I mis- -- focusing on the
5 qualification, after the inbound inspection, would
6 it then go to the Rule 88 inspection?

7 A. Oh. This document is, just as I said, the
8 inbound inspection document. The car then
9 ultimately moves to various workstations within the
10 repair facility. And -- excuse me -- when that car
11 gets to the work center that deals with truck and
12 brake and wheel issues, those bearings are inspected
13 once again.

14 (Defendant's Exhibit 88 was
15 marked/received into evidence.)

16 BY MR. FLEMING:

17 Q. And so I'd like to next show you
18 Exhibit 88, Defendant's Exhibit 88, to which there
19 is no objection, and ask you if this -- ask you to
20 tell the jury: What is this document?

21 A. This is the checklist that is followed at
22 that work center where the actual Rule 88 inspection
23 is done.

24 Q. And we'll pull up the larger box so
25 everyone can see that this lists -- what does it

1 tell -- or what does the inspector do? Can you just
2 describe that generally.

3 A. Well, there is a fairly long list of
4 individual items that that inspector must review,
5 and then he ascertains whether or not that
6 particular item passes or fails and whether or not
7 repair is required or not.

8 Q. And during this inspection is a wheel
9 bearing inspection performed?

11:52AM 10 A. Yes.

11 Q. Is that the 36 -- the Rule 36 inspection?

12 A. Yes.

13 Q. And on this document, what is the result of
14 the wheel bearing inspection?

15 A. That those bearings passed inspection and
16 that no repair was required.

17 Q. Where was the qualification performed; what
18 facility?

19 A. This particular shopping that we're talking
11:52AM 20 about today is Cleveland, Texas.

21 Q. And at the time in 2013, was Cleveland --
22 was Union Tank Car's shop an AAR-approved shop?

23 A. It is an AAR-certified facility. Was then
24 and is today.

25 Q. What does it mean to be an AAR-approved

1 shop?

2 A. That you have documented that the people at
3 the repair facility are trained, that they are
4 certified to perform certain inspections using
5 inspection techniques, that they conform to the AAR
6 interchange rules in their inspection and repair of
7 equipment.

8 Q. Does the FRA and AAR audit us to maintain
9 that certification?

11:53AM 10 A. The AAR has audit rights to come in and
11 inspect a facility and to question people and review
12 their processes, as does the Federal Railroad
13 Administration, the FRA.

14 Q. Is Union Tank Car Company the only company
15 that operates AAR-approved repair shops?

16 A. No, sir.

17 Q. Sir, based on your review of the 2013
18 qualification and, in particular, Exhibits 14 and
19 88, when the car departed from Cleveland, Texas, had
11:54AM 20 it passed inspection and was it qualified for use in
21 interchange?

22 A. Yes.

23 Q. Based on your review of the 2013
24 qualification records and on your review of Exhibits
25 14 and 88, when the tank car left Cleveland, Texas,

1 did it comply with all applicable AAR rules?

2 A. Yes, sir.

3 Q. And if Union Tank Car had performed and
4 passed the AAR Rule 36 inspection, would the bearing
5 have also passed the inspection required by the Code
6 of Federal Regulations 215.115?

7 MR. FRIEDMAN: Object to form. Object to
8 that. It's calling for speculation, calling for
9 expert testimony.

11:54AM 10 MR. FLEMING: First of all, Your Honor --

11 MR. FRIEDMAN: Lack of foundation.

12 MR. FLEMING: First of all, Your Honor, we
13 did designate Mr. Constantino as an expert witness
14 to which there was no objection filed with the
15 Court.

16 That being said, this is not calling for an
17 expert's testimony. There is a Code of Federal
18 Regulation that lays out similar conditions under
19 which the bearing is required to be --

11:54AM 20 THE COURT: Why don't you ask a little more
21 foundation questions for your last question.

22 BY MR. FLEMING:

23 Q. During the Rule 88 and 36 inspections that
24 were performed in Cleveland, Texas, is there any
25 indication in any of the repair records that the

1 Union Tank Car repair shop noted or discovered
2 discoloration or damage to the bearing seal?

3 A. No, sir.

4 Q. Any indication in the records that there
5 was any distortion of any bearing component?

6 A. None.

7 Q. Any indication in the record that Union
8 Tank Car found or discovered a loose or missing cap
9 screw?

11:55AM 10 A. None whatsoever.

11 Q. Any indication in the record or evidence
12 that Union Tank Car discovered broken, missing or
13 improperly-applied cap screw locks?

14 A. No.

15 Q. Was there any evidence in the Union Tank
16 Car repair records that Union Tank Car's Rule 36
17 inspection revealed a bearing with a seal that was
18 loose or damaged or that permitted leakage?

19 A. No.

11:55AM 20 Q. Sir, do you understand that those
21 conditions are the conditions called out in Code of
22 Federal Regulations 215.115?

23 MR. FRIEDMAN: We object to this, leading
24 the witness.

25 MR. FLEMING: I asked him foundationally if

1 he knows that those are the conditions.

2 THE COURT: I'll overrule the objection.

3 BY MR. FLEMING:

4 Q. Do you know, sir?

5 A. The conditions that you outlined are from
6 the federal code but are likewise mirrored in Rule
7 36.

8 Q. And as a consequence of that, when the tank
9 car left Union Tank Car, did Union Tank Car consider
11:56AM 10 it in compliance with Code of Federal Regulations
11 215.115?

12 A. Yes.

13 Q. Is anyone else required to follow Code of
14 Federal Regulations 215.115?

15 A. While the car is in service, everyone who
16 has the opportunity to operate the car conforms to
17 the same set of regulations.

18 Q. Who would that include?

19 A. All the railroads handling the car, as well
11:56AM 20 as a shipper tendering that car into interchange
21 service.

22 Q. Does Rule 88 or Rule 36 or any AAR rule
23 require that Union Tank Car or any repair shop
24 remove a bearing based on the life of the bearing or
25 age of the bearing?

1 A. No, sir.

2 Q. Is there any rule that you're aware of,
3 that Union Tank Car is aware of, that requires the
4 removal of a journal, a journal roller bearing at
5 10 years of service life?

6 A. No, there is no such rule.

7 Q. Are you aware of any tank car owner or
8 railroad that employs or imposes such a rule on its
9 roller bearings?

11:57AM 10 A. No, I'm not.

11 Q. Has Union Tank Car ever been told by Amsted
12 or any manufacturer of bearings or wheel sets that
13 the AAR -- that AAR-approved roller bearings must be
14 removed after 10 years?

15 MR. FRIEDMAN: Your Honor, I don't know
16 what this is offered for, but it's clearly hearsay.
17 If they know, if there is any knowledge of that,
18 that's fine, but having been told, I object to that.

19 MR. FLEMING: I'm asking if Union Tank Car
11:58AM 20 has ever been told by manufacturers. The plaintiffs
21 have put into evidence or through their -- through
22 their expert that they contend the Brenco®
23 manufacturer told certain things, and it goes to
24 notice, not the truth of the matter.

25 MR. FRIEDMAN: We withdraw our objection,

1 Your Honor, if that's the purpose they're asking.

2 THE COURT: Thank you.

3 BY MR. FLEMING:

4 Q. Let me repeat it, sir.

5 Has Union Tank Car ever been told by Amsted
6 or any manufacturer of bearings for wheel sets that
7 AAR-approved roller bearings must be removed after
8 10 years?

9 A. No, sir.

11:58AM 10 Q. Instead, what do the AAR's manual for
11 standards and practices say with respect to the
12 journal roller bearings; how long must they be
13 designed or manufactured to last?

14 A. The submission standard for getting AAR
15 approval for bearing design calls out that that
16 bearing must be reliable for a minimum of 500,000
17 miles of over-the-road service.

18 (Defendant's Exhibit 148 was
19 marked for identification.)

11:59AM 20 MR. FLEMING: Your Honor, we provided a
21 copy last week during Mr. Whelan's testimony, but I
22 would like to offer for admission and publication
23 Exhibit 148, which is a copy of Association of
24 American Railroads' Manual of Standards and
25 Recommended Practices, Specification M-934-82, which

1 is the Standard for Freight Car Journal Roller
2 Bearings effective March 1, 1983.

3 And because we just provided it -- it
4 wasn't on our exhibit list -- I want to give the
5 plaintiffs an opportunity to object.

6 THE COURT: Any objection?

7 MR. DAVIS: Your Honor, we've seen this,
8 and, no, no objection.

9 THE COURT: Thank you. We'll admit 148.

11:59AM 10 (Defendant's Exhibit 148 was
11 received into evidence.)

12 BY MR. FLEMING:

13 Q. Mr. Constantino, is Exhibit 148 the
14 applicable section of M-934 that you were referring
15 to with respect to the 500,000-mile roller bearing
16 life?

17 A. It is.

18 Q. And is Exhibit 148 the 1983 version of AAR
19 M-932 -- 934, the version that would have applied to
12:00PM 20 the roller bearings in 1994?

21 A. Yes, sir, it is.

22 Q. Thank you.

23 Sir, the plaintiffs have told the jury that
24 following the 2013 qualification, Union Tank Car
25 knew that it would not have seen the tank car or the

1 roller bearings over the next 10 years; is that
2 true?

3 A. No. No, the car operating in service is
4 reviewed by many parties that report activity and
5 outcomes back to Union Tank.

6 Q. Are there also devices that ensure that it
7 is monitored and inspected?

8 A. Sure, there are multiple forms of
9 monitoring equipment in the North American rail
10 system that watch equipment for its location; hotbox
11 detectors to look at the condition of bearings,
12 acoustic high-impact detectors to look at the
13 condition of wheels.

14 Q. Does the AAR also require that the
15 railroads keep -- participate in the process?

16 A. Well, the instrumentation that I was
17 talking about is on railroad property.

18 Q. I'm focusing more on -- I want to talk
19 about the AAR Rule 1. Does the AAR also provide
12:01PM 20 that the railroads will participate in the
21 monitoring and inspection process?

22 A. Well, all the major railroads are signators
23 to the interchange rules, which is a large body of
24 rules, and Rule No. 1 is very clear in that a
25 railroad accepting a freight car onto its line is

1 responsible for its condition. Once they accept it,
2 they're responsible for it.

3 Q. If a railroad or even the Union Tank Car
4 customer discovers a tank car in need of repair,
5 including in need of a wheel set or a bearing
6 replacement, are they empowered and obligated under
7 the AAR rules to take that car out of service?

8 A. Well, I mentioned the interchange rules
9 before, and that is a collective agreement by all
10 the participation -- all the participants in the
11 industry to be conscientious, and if any railroad
12 found cause, they could take the wheel set off and
13 replace it.

14 Likewise, a shipper who noticed a car in
15 distress would report that back to Union Tank Car
16 rather than allow the car to continue in service.

17 Q. So even though the car is out of Union Tank
18 Car's possession, the railroads and customers are
19 required and participating in the -- in ensuring
12:03PM 20 that the car's remaining in compliance with the
21 rules?

22 A. Yes, sir, absolutely.

23 Q. If someone other than Union Tank Car makes
24 the repair, who pays for it?

25 A. Unless it is an abuse situation, it's Union

1 Tank Car Company that's financially responsible
2 ultimately to sponsor that repair.

3 Q. Does that mean Union Tank Car's checkbook
4 follows its cars?

5 A. Yes.

6 Q. There has been a suggestion in the opening
7 statement that there was an issue with the bearing
8 adapter back in 20- -- in 2004 and a suggestion that
9 the car, 901717, had been submerged.

12:03PM 10 (Plaintiffs' Exhibit 144 was
11 marked/received into evidence.)

12 BY MR. FLEMING:

13 Q. I'd like to show you Plaintiffs' Exhibit
14 144, particularly a page from Exhibit 144 which is
15 the qualification file for 901717 from 2004, and ask
16 you to take a look at line 15, and explain to the
17 jury what we're looking at.

18 THE COURT: Is this document in evidence?

19 MR. FLEMING: Well, no, there is no

12:04PM 20 objection to this document.

21 THE COURT: No objection.

22 MR. FRIEDMAN: No objection, Your Honor.

23 BY THE WITNESS:

24 A. This is part of the car file, once again.

25 This is the inbound inspection document. And with

1 respect to the bearing adapters, there was a
2 notation from that inbound inspector that those
3 adapters required additional attention when the car
4 got to a work center.

5 BY MR. FLEMING:

6 Q. And, again, this is the same form that we
7 looked at under Exhibit 14, this RES-082-2, which is
8 the inbound inspection?

9 A. Yes, sir.

12:05PM 10 Q. This isn't the final inspection?

11 A. No, it isn't. It isn't a work document
12 itself; it's an inspection document.

13 Q. What did we do to the bearing adapter
14 following this inbound inspection?

15 A. When it -- when it moved -- when the car
16 moved on to the actual work center, the folks at
17 that point did inspect and ensure that the roller
18 bearing adapters were in compliance with the
19 criteria for continued service for those features.

12:05PM 20 Q. Have you personally reviewed the 2004
21 qualification file?

22 A. I have, yes.

23 MR. FLEMING: And can you bring up the next
24 part of Exhibit 144, Ms. Bauer. Can you zoom in?

25

1 BY MR. FLEMING:

2 Q. Mr. Constantino, on Exhibit -- another page
3 of Exhibit 144 from the plaintiffs. Is -- is there
4 an entry that reveals to you that we did, in fact,
5 inspect the bearing adapter?

6 A. Yes. And, in fact, based on the position,
7 it shows that all the bearings, A and B end of the
8 car, right and left side of the car, did have their
9 bearing adapters inspected, and there is a charge of
10 one hour to have accomplished that work.

12:06PM

11 Q. When you say there is an entry that
12 reflects that the A and B and right and left
13 inspections occurred, is that the ABRL?

14 A. It is, sir, yes.

15 Q. Based on your review of Exhibit 144 and
16 particularly the inbound inspection report that
17 reflect the entry "may be water," is there anything
18 in the 2004 qualification records to suggest or
19 support that the bearing adapters were submerged?

12:07PM

20 A. No, sir.

21 Q. Are there other explanations for the entry
22 of "may be water"?

23 A. They were rusty.

24 Q. Where was this car leased and -- where was
25 this car leased and operated out of?

1 A. It was operating in North America and
2 subject to the elements.

3 Q. And was it primarily in the midwest where
4 INEOS was located?

5 A. Well, most of the shipping records show an
6 Ohio origin point. It did deliver material to
7 Michigan, as well as other locations.

8 Q. And you're from Chicago and the midwest
9 area. Does it rain and snow in the midwest?

12:08PM 10 A. It does.

11 Q. Based on -- well, if -- if this railcar
12 901717 had been submerged at any point in the
13 history of its existence, is that a big deal?

14 A. Yes, sir, it certainly is.

15 Q. Why?

16 A. Well, the rules are very specific with
17 respect to bearing assemblies and brake systems, and
18 beyond that, you have every chance of other systems
19 of the car being compromised.

12:08PM 20 Q. Can a wheel set or bearing -- well, let me
21 withdraw it and ask it this way: Can a tank car
22 with a wheel set or a bearing that has been
23 submerged even be moved before being replaced or
24 reconditioned?

25 A. No, sir. The rules outline that the wheel

1 set is to be exchanged before the car makes another
2 move.

3 Q. You raised the rules. In fact, does Rule
4 36 contain a rule that says cause for removal is a
5 tank car that has -- that shows a roller bearing
6 that has been submerged?

7 A. If there is any evidence in the course of a
8 Rule 36 inspection, yes.

9 MR. FLEMING: Can you put up 111, Defense
12:09PM 10 Exhibit 111, which we were looking at a few minutes
11 ago, which is Rule 36.

12 BY MR. FLEMING:

13 Q. And No. 2, under Cause For Removal, do you
14 see that, sir?

15 A. I do. Very clear. "Damage from being
16 submerged or from electric arcing."

17 Q. Is cause for removal?

18 A. That's correct.

19 Q. Are there also -- let me ask you: What are
12:10PM 20 Why Made Codes?

21 A. It is -- Why Made Codes are definitions,
22 explanations for the cause of performing a
23 particular repair. They are used to standardize
24 language and to simplify reporting of repair
25 activity.

1 Q. Are there distinct and separate Why Made
2 Codes for submersion?

3 A. There are, yes.

4 Q. If this car had ever been submerged,
5 would -- and in need of repair for submergence,
6 would those Why Made Codes be used to identify those
7 conditions?

8 A. Yes, you should have evidence of the wheel
9 sets being exchanged and that Why Made Code would be
10 displayed.

12:10PM

11 Q. And have you seen any record that such a
12 Why Made Code has been entered into the 2004 car
13 file?

14 A. No, sir.

15 Q. Can a railroad or a customer or even Union
16 Tank ever place into interchange a tank car that has
17 been submerged or in a flood?

18 A. No.

19 Q. In addition, in the opening, there was
20 suggestion that water may have reached the stencils
21 on the side of the car and infiltrated the
22 insulation. Under the rules, could that car have
23 been returned to service without replacing every
24 wheel set and bearing?

12:11PM

25 A. No, sir.

1 Q. Is there any evidence in your review of the
2 car file in 2004 or otherwise to suggest that this
3 car has ever been submerged?

4 A. None whatsoever.

5 Q. If it had been -- well, I'll withdraw.

6 Now, I want to ask you a question.

7 Plaintiffs showed in opening Plaintiffs'

8 Exhibit 144, a specific part of Exhibit 144, a

9 specific page, and I'd like to call that up.

12:11PM 10 THE COURT: Why don't we do this if we're
11 done: It sounds like it's a little bit different
12 subject matter. It might be a good time to take our
13 lunch break.

14 MR. FLEMING: That's fine.

15 THE COURT: I'm going to let the jury go
16 on, since we've been going a couple hours, and ask
17 the jury to be back at 1:30.

18 (Jurors excused from the courtroom.)

19 THE COURT: All right. Thank you.

12:12PM 20 Everyone may be seated. And, Mr. Constantino, you
21 can step on down.

22 THE WITNESS: Thank you.

23 THE COURT: Mr. Davis, you wanted to raise
24 objections to the memorandum in an order filed this
25 morning by Judge Poplin.

1 MR. DAVIS: Yes, Your Honor. I'm looking
2 at Rule 72 of the Federal Rules of Civil Procedure,
3 basically 72(a), and I'm sure the Judge -- I'm sure
4 Your Honor is well aware of the standard for
5 overruling a magistrate in a non-dispositive motion
6 issue like this. But we believe that this puts
7 plaintiffs in a very untenable position with regard
8 to these depositions, and as someone who has been
9 taking expert depositions and defending expert
10 depositions for over 30 years, if these depositions
11 can come in, I wouldn't know how to either take or
12 defend those depositions, Your Honor, because
13 basically what is happening here is that they're
14 being able to convert a discovery deposition into a
15 deposition for -- an expert discovery deposition
16 into an expert deposition for trial.

17 So whenever any plaintiffs' attorney or any
18 defense attorney, for that matter, goes to take an
19 expert's deposition, they have to consider that this
20 is going to be played at trial. And it's going to
21 have to be played -- they will have to cross-examine
22 this witness just as if they're cross-examining the
23 expert at trial, which totally destroys the
24 discovery deposition under Rule 26(a) for experts.

25 So, yes, you can take depositions for

1 proof. It happens all the time, and that -- and at
2 that stage, the attorney taking the deposition or
3 defending the deposition both are aware that it's
4 going to be played at trial and they're going to be
5 doing their best to cross-examine the witness or
6 make objections.

7 The plaintiffs were taking the deposition
8 of Mr. Bullock. So it's not like the plaintiffs
9 were going to make objections to what Mr. Bullock
10 was testifying to.

12:15PM

11 There was a general objection that
12 Mr. Bullock was being called as an expert but hadn't
13 provided an expert report. So it was even more
14 difficult for Mr. Nichol, who took that deposition,
15 to know how to take the deposition when he didn't
16 even have an expert report. He couldn't
17 cross-examine the expert based upon a report because
18 there wasn't one.

12:15PM

19 And, of course, what Mr. Nichol was doing
20 at the time was trying to discover the expert's
21 opinion since there was no report. And so in the
22 process of doing so, he asked open-ended questions
23 about the expert's opinions to get them all out
24 there so he could then go back -- or plaintiffs
25 could go back and prepare to cross-examine

1 Mr. Bullock if he came to trial.

2 I just -- if this is allowed, then there is
3 no discovery depositions of experts anymore. I
4 mean, there is no way that you'd go into a
5 deposition of an expert and take it as if you're
6 trying to discover the expert's opinions. It will
7 have to be a full-on cross-examination with whatever
8 you can bring to that deposition in advance of even
9 asking the expert what their opinions are.

12:16PM 10 So that is the concern that we have.
11 That's the reason why we believe the magistrate
12 judge's decision on this issue is wrong. And so far
13 I've been talking about Mr. Bullock, Dr. Bullock.
14 Mr. Fulk is even more difficult for any party to
15 deal with.

16 Mr. Fulk was plaintiffs' expert. He was
17 withdrawn before trial. And when the expert
18 deposition was taken by the defendant, of course
19 plaintiffs' attorney wasn't considering that that
12:16PM 20 was going to be played at trial.

21 Plaintiffs' attorney who defended that
22 deposition was objecting on occasion, but not from
23 the standpoint that when Mr. Fulk was expressing
24 opinions that they want to display to the jury now,
25 and so it's -- again, it turns the whole discovery

1 deposition idea on its head if a deposition that is
2 clearly a discovery deposition can be used at trial
3 to play the expert's opinions, even if the party who
4 sponsored that expert has withdrawn the expert.

5 So I -- the caselaw is both directions, and
6 I think the magistrate judge recognized that, and
7 I'm not going to comment on the legal analysis
8 behind this, but I'm just imploring the Court that,
9 based upon sound law practice, this just makes it
10 impossible to know how to do an expert deposition.

12:17PM

11 THE COURT: All right. Thank you.

12 Who is going to respond?

13 MR. KING: Your Honor, I've only had a few
14 moments to look at Judge Poplin's order, so I'm
15 going to just address the comments that were
16 directly made by counsel now.

17 I begin by noting, Your Honor, that there
18 is no distinction in the rules about depositions.
19 This idea of a discovery deposition, proof
20 deposition, they don't exist. A deposition is a
21 deposition.

12:18PM

22 The parties can choose to take that
23 deposition in whatever manner they see fit. If they
24 want to ask open-ended questions, they can ask
25 open-ended questions. If they want to do

1 cross-examination, they can do cross-examination.

2 The way the questions are asked may lead to
3 rulings by the Court as to whether those questions
4 are admissible. You can't ask, for example, your
5 client a leading question. You object to the form;
6 it comes in.

7 There may be other objections that come at
8 trial, but that's a completely different issue.

9 This concept of discovery versus a proof deposition,
10 they basically do not exist.

11 Rule 32, as well as the hearsay rules under
12 the Federal Rules of Evidence and Rule 32 of the
13 Rule of Civil Procedure control this.

14 What we have in this case, Your Honor, in
15 terms of precedence, I guess, we're setting is this:
16 Under Tennessee law, comparative fault, and you go
17 to -- go to trial, you prepare for trial, and
18 everybody is expecting a case to be done a certain
19 way, and then a week before the trial begins, one of
20 the parties settle. And there is certainly nothing
21 wrong with that. There is nothing at all that
22 prohibits that. But at that point, because the
23 plaintiffs have changed their strategy doesn't mean
24 that defendants are then stuck with their change in
25 strategy.

1 The reality is, Your Honor, that these
2 depositions were taken. The witnesses were
3 unavailable. They meet all the requirements of the
4 rule.

5 As it relates to Mr. Bullock's deposition,
6 the fact that they took a strategy in that
7 deposition to ask questions in a certain way and
8 they would have done it a different way doesn't make
9 that deposition inadmissible; it doesn't make its
10 use inadmissible.

11 With regard to Mr. Fulk, that answer, quite
12 frankly, Your Honor, is even simpler. Mr. Fulk is
13 their expert. If they want to ask Mr. Fulk
14 questions, bring Mr. Fulk. That's as simple as it
15 gets.

16 But, Your Honor, with both of these
17 questions, and I think -- and this was argued during
18 the hearing, and, again, I've not had an opportunity
19 to go detailed into Judge Poplin's opinion, but
20 these were the same issues that were raised at the
21 hearing. And the Court, Judge Poplin, took those
22 into consideration and decided, from what I
23 understand from the ruling, that the depositions
24 were admissible for all purposes.

25 And I think, Your Honor, that the decision

1 was correct, and we would ask the Court to uphold
2 the report recommendation of Judge Poplin.

3 THE COURT: All right. Thank you. I think
4 I understand the parties' positions and obviously
5 the standards applicable. I'll issue a ruling when
6 we get back from lunch.

7 So is there anything else? We've got
8 Mr. Constantino.

9 MR. KING: Yes, Your Honor. I just
10 don't --

11 THE COURT: That will take a while.

12 MR. KING: It will. And for scheduling
13 purposes, I'm just asking the Court, at that point,
14 I think the plaintiffs' proof closed. We'll have
15 some motions we want to bring.

16 It might be helpful, because assuming,
17 based on the ruling right now, we're going to get
18 together at 3:00. We're probably going to talk
19 during lunch. But I'm not sure the videos, if we're
20 going to play them, would be ready that quickly.

21 I know Mr. Constantino will take a while,
22 but if it would please the Court, we would suggest
23 that perhaps that when he's concluded at some point
24 this afternoon that we address the --

25 THE COURT: We might be ready for an

1 afternoon break by the time he's concluded. So --

2 MR. KING: I just don't know how much we're
3 going to be able to get on in terms of the videos
4 after that, given where we stand at this point,
5 especially since we may be in Judge Poplin's
6 courtroom at 3:00.

7 THE COURT: Well --

8 MR. KING: Actually, Dr. Bullock is a
9 reading. It's not even a video. Dr. Bullock's a --

12:21PM 10 THE COURT: And also, keep in mind, for
11 purpose of keeping this trial going, we're not
12 adjourning court at 3:00. I'm saying: There is
13 three or four attorneys on each side. Somebody is
14 going to go to Judge Poplin's courtroom, but --

15 MR. KING: Oh, no. What I meant --

16 THE COURT: -- the remainder of the people
17 are going to stay here.

18 MR. KING: I understand. What I meant was:
19 In terms of presenting additional evidence, it may
12:22PM 20 depend upon what the final rulings are on that.

21 THE COURT: I understand. But, otherwise,
22 be prepared with testimony and evidence to get us
23 through to the end of the day.

24 MR. KING: Thank you, Your Honor.

25 THE COURT: All right. We'll see everybody

1 back here at 1:30.

2 THE COURTROOM DEPUTY: All rise. This
3 honorable court should stand in recess until 1:30.

4 (Whereupon, a lunch recess was
5 had, after which the Trial
6 Proceedings were resumed at the
7 hour of 1:40 p.m. as follows:)

8 THE COURTROOM DEPUTY: All rise. Please
9 come to order and be seated.

01:40PM 10 THE COURT: Let me just take a moment to
11 rule on plaintiffs' objections to Magistrate Judge
12 Poplin's order as that affects defendant's
13 presentation of evidence and the scheduled 3 p.m.
14 hearing today with Judge Poplin with respect to the
15 Bullock objections.

16 Specifically, plaintiffs object to the
17 order which permits defendants to introduce the
18 deposition testimony of Fulk and Bullock.

19 Federal Rule of Civil Procedure 72(a)
01:40PM 20 provides when a magistrate judge issues a ruling on
21 a non-dispositive matter, the parties may file
22 objections with the district court, and the rule
23 then provides the district judge must consider
24 timely objections and modify or set aside any part
25 of the order that is clearly erroneous or contrary

1 to law.

2 Here, having carefully reviewed Judge
3 Poplin's order and having considered the parties'
4 arguments before the lunch break, the Court will
5 overrule plaintiffs' objection.

6 For the depositions of both expert
7 witnesses, the Court did not hear argument that
8 Magistrate Judge Poplin misapplied any particular
9 statute, Rule of Civil Procedure, or Rule of
01:41PM 10 Evidence; rather, plaintiffs' arguments centered
11 upon an argument that permitting the admission of
12 depositions of this type would be unfairly
13 prejudicial to them and would make it more difficult
14 for attorneys in the future to take so-called
15 discovery depositions as opposed to expert
16 depositions intended for proof at trial.

17 But as the defendants have pointed out,
18 Rules 26 and 32, along with other pertinent Federal
19 Rules of Civil Procedure, do not draw any such
01:41PM 20 distinction; instead, parties are given great
21 latitude under the rules to depose witnesses,
22 including experts, on whatever topics they see fit.

23 Here, Judge Poplin found that both Fulk and
24 Bullock were timely and properly disclosed as expert
25 witnesses. Indeed, Fulk was, at the time,

1 designated -- was designated as plaintiffs' own
2 testifying expert, and the Court would find it was
3 up to the parties to determine what topics they
4 wished to explore during these depositions, along
5 with how much preparation they wished to commit to
6 deposing these two particular witnesses.

7 And for all these reasons, the Court is not
8 convinced that permitting the admission of these
9 depositions would greatly increase the burden on
01:42PM 10 attorneys litigating cases in the federal court
11 system when preparing for depositions.

12 Moreover, the Court agrees with Judge
13 Poplin that plaintiffs have failed to specifically
14 identify what forms of unfair prejudice they would
15 suffer from the admission of these depositions.

16 Indeed, with respect to Fulk, because Fulk
17 was plaintiffs' own testifying expert witness, the
18 Court finds the risk of unfair prejudice or surprise
19 from his testimony to be particularly minimal,
01:43PM 20 given, among other things, that plaintiffs, as
21 defendants argued, could still or still remain free
22 to call him as a witness in this trial.

23 Therefore, as to the specific objection
24 regarding unfair prejudice plaintiffs have raised
25 today, the Court finds Judge Poplin's order was not

1 clearly erroneous or contrary to law, and having
2 reviewed the entire order in detail, the Court
3 agrees with the conclusions therein as a whole, and
4 the Court would, therefore, overrule plaintiffs'
5 objections to Judge Poplin's order.

6 Next, I'm going to go ahead and issue a
7 ruling on plaintiffs' objections to defendant's
8 designations for the deposition testimony of
9 Mr. Fulk. The Court is basing this ruling on the
01:43PM 10 list of designations, objections and responses
11 provided by counsel.

12 Plaintiffs' objections appear to be all
13 based on one ground, that certain designated
14 portions of the Fulk deposition are irrelevant in
15 light of the Court's summary judgment ruling,
16 specifically in regard to the preemption of an
17 alleged look-back duty under Tennessee law.

18 After ruling -- excuse me. After reviewing
19 the Fulk deposition, the Court is going to overrule
01:44PM 20 in part, sustain in part, these objections.

21 First, the Court will sustain plaintiffs'
22 objections as to pages 136 to 140. The Court finds
23 that this testimony does relate primarily to an
24 alleged look-back duty under Tennessee law, as well
25 as the design and maintenance of CSX railroad

1 tracks. The Court has already held these topics to
2 be preempted under federal law. Thus, the Court
3 finds this testimony would be irrelevant under Rule
4 401. And even if it did have some marginal
5 relevance to other issues of consequence in this
6 case, it would be substantially more prejudicial
7 than probative under Rule 403.

8 Next, the Court will overrule plaintiffs'
9 objections as to pages 152 through 156 of the Fulk
01:45PM 10 deposition. Although this testimony, to some
11 degree, touches on the preemptive matters just
12 discussed, the Court finds the primary subject
13 matter of this testimony is whether CSX personnel,
14 in fact, observed problems with the tank car but
15 failed to stop the train. This directly bears on
16 CSX -- excuse me -- on UTC's affirmative defense of
17 comparative fault and is, therefore, relevant under
18 Rule 401.

19 Moreover, the Court finds the probative
01:45PM 20 value of this portion of the testimony is not
21 substantially outweighed by the danger of unfair
22 prejudice, including the danger the jury would
23 consider the testimony as evidence of preemptive
24 matters.

25 Accordingly, the Court will permit

1 defendant to introduce the designated portions on
2 pages 152 through 156 of the deposition but not the
3 designated portions on 136 to 140.

4 I wanted to take care of that. We'll bring
5 our jury back in and continue with this witness.

6 (Whereupon the following report of
7 proceedings was had within the
8 presence and hearing of
9 the jury:)

01:46PM 10 THE COURT: Thank you. Everyone may be
11 seated. We'll continue with the direct examination
12 of this witness.

13 BY MR. FLEMING:

14 Q. Mr. Constantino, before we left off for
15 lunch, we were talking about one of the other
16 suggestions made in opening that water may have
17 reached the stenciling or infiltrated the insulation
18 on 901717, the tank car in question, prior to the
19 2004 qualification. And I had broadcast

01:47PM 20 Exhibit 140- -- Plaintiffs' Exhibit 144 and a
21 particular page from that exhibit.

22 Could you tell the jury what we're looking
23 at. What does this document reflect from Union Tank
24 Car?

25 A. This is a document that was generated by

1 folks in the repair shop to itemize certain work
2 routines that they were going to go through while
3 processing the car at the repair shop. That would
4 not have been part of the initial inspection upon
5 arrival. This particular work order is something
6 that was in our electronic system of instructions to
7 repair shops.

8 Q. And when you say this particular work order
9 was in your system, explain to the jury what you
01:48PM 10 mean by that order being in your system.

11 A. Certainly. If -- hopefully I can work this
12 correctly.

13 If you look at this area right in here
14 (indicating), it says Order No. followed by a
15 five-digit code. That is an internal system that we
16 use to highlight to all the repair shops in our
17 network a certain scope of work, an item that the
18 shop needs to pay attention to and a routine of
19 inspection and work that we want them to do.

01:49PM 20 This particular project is a company repair
21 project No. 60202.

22 Q. Does that mean that project 60202 pre- --
23 already existed and was called out to be performed
24 on a tank car if it came in and showed indications
25 necessary for project 60202 to be completed?

1 A. Right. Our procedure is --

2 MR. FRIEDMAN: Your Honor, I hate to
3 interrupt Mr. Constantino. I believe this calls for
4 speculation. This witness has no firsthand
5 knowledge of what he's talking about other than
6 reading a document and speculating as to what it
7 means. It's either -- at this point, it's either
8 insufficient foundation laid for the testimony or
9 it's just rank speculation.

01:49PM 10 MR. FLEMING: Your Honor, I'm laying the
11 foundation. This witness was employed by Union Tank
12 Car at the time. He's familiar with this project.
13 Plaintiffs first raised this issue in opening and
14 Mr. Constantino is fully familiar with this -- with
15 this particular insulation issue.

16 THE COURT: I'll overrule the objection.
17 Go ahead.

18 BY THE WITNESS:

19 A. Within our system, we capture project
01:50PM 20 detail and assign project numbers. At the same
21 time, we look at groups of cars or types of cars
22 that will be subject to the program and that
23 inspection.

24 This particular project number is something
25 that was established when I was directly involved in

1 that area of the business, and when this issue first
2 came up, there was a very simple explanation as to
3 the language used, and I recognized the project
4 number right off the top looking at the work order.

5 BY MR. FLEMING:

6 Q. What was the issue with respect to wet
7 insulation? Can you tell the jury?

8 A. Yes. As more cars of this particular type
9 were brought into the fleet, our engineering group
01:51PM 10 and our repair people determined that the
11 combination of insulation -- this car has both
12 fiberglass insulation and also ceramic fiber
13 insulation for thermal protection. But it was
14 determined that that combination had a tendency to
15 wick, pull in atmospheric moisture, humidity, and
16 hold on to it as opposed to plastic, just to let it
17 evaporate.

18 And it was determined that the best way to
19 allow that excess moisture to evacuate was to just
01:52PM 20 drill a series of holes along the bottom centerline
21 of the car. And that's what that project calls out
22 for.

23 Q. Was the insulation that we're talking
24 about, was it inside the tank jacket itself?

25 A. All insulation materials are covered by the

1 exterior jacket and are layered on top of the inner
2 tank. So it -- yes, the insulation material is
3 in-between those two features.

4 Q. When did this project originate?

5 A. That goes back to -- the letter was
6 published in 1996.

7 Q. You mentioned a letter. Were you able to
8 research this issue and discover that there was a
9 project memo created that was disseminated to the
10 repair fleet?

01:52PM

11 A. Yes.

12 Q. And were you able to bring a copy of that
13 with you today?

14 A. It was secured.

15 MR. FRIEDMAN: Your Honor, this is the
16 first time we're hearing of this. We haven't seen
17 it to this day. This is nothing but surprise by
18 ambush. And we've asked for all these documents
19 years ago. We would at least like to see it before
20 there is any testimony about it. And we'd object to
21 it anyway.

01:53PM

22 MR. FLEMING: Your Honor, the first time we
23 heard about an insulation issue in the last three
24 years was in opening statement. None of -- none of
25 this case has been about the insulation in this car

1 whatsoever. The insulation has nothing to do with
2 the bearings or the truck equipment and a statement
3 was made that it's evidence of submersion.

4 Mr. Constantino --

5 THE COURT: Opening statement or is there
6 some proof that's been presented that you're seeking
7 to rebut or address?

8 MR. FLEMING: At this point, the plaintiffs
9 have not been able to submit, but I anticipate they
01:53PM 10 will on cross. If Your Honor would like me to hold
11 this until redirect.

12 THE COURT: If we can hold off then. Right
13 now, since it's not on the exhibit list and in light
14 of the objection, I'll sustain the objection for the
15 time being.

16 MR. FRIEDMAN: Your Honor, may I see a copy
17 of it?

18 Thank you.

19 BY MR. FLEMING:

01:54PM 20 Q. Was the letter that was generated, however,
21 disseminated to the repair fleet?

22 A. Yes. The address -- excuse me -- at the
23 top of that letter was to all plant managers, which
24 is our designation for the managers of those repair
25 installations that were in the network at the time.

1 Q. And when you look at Exhibit 144 and the
2 notation that's in front of us, it calls out the
3 60202. Is that confirmation that that project was
4 completed during the 2004 qualification?

5 A. Yes.

6 Q. Is there any indication from that document
7 or as it relates to the wet insulation project that
8 has anything to do with or establishes that this car
9 was submerged?

01:55PM 10 MR. FRIEDMAN: Your Honor, that's leading,
11 and it's trying to get into a document that we've
12 first seen just moments ago.

13 THE COURT: I thought you were talking
14 about -- are you talking about the document that
15 we're not introducing or are you talking about 144?

16 MR. FLEMING: I'm talking about 144.

17 I'll rephrase.

18 THE COURT: Thank you.

19 BY MR. FLEMING:

01:55PM 20 Q. You've reviewed the 2004 qualification car
21 file; correct?

22 A. Correct, yes.

23 Q. Is there anything in the 2004 qualification
24 car file that indicates that this tank car had been
25 submerged prior to that shop request?

1 A. Nothing. No -- no designations of that at
2 all.

3 Q. And does that include this wet insulation
4 callout on Plaintiffs' Exhibit 144?

5 A. This project has absolutely nothing to do
6 with that.

7 Q. Mr. Constantino, where do you live?

8 A. I live in a suburb of Chicago called
9 Oswego, Illinois.

01:56PM 10 Q. How old are you?

11 A. I'll be 63 years old this year.

12 Q. Are you married?

13 A. Yes.

14 Q. Do you have any children?

15 A. Three adult children.

16 Q. Do you have any grandchildren?

17 A. Three grandchildren.

18 Q. Where did you go to school?

19 A. I went to school at a state school, Western
01:56PM 20 Illinois University in Macomb, Illinois.

21 Q. Did you obtain any degrees?

22 A. A Bachelor of Business degree.

23 Q. And, again, explain your current
24 occupation.

25 A. President of North American Rail Leasing on

1 a day-to-day basis functioning as a general manager
2 of Union Tank Car leasing business unit.

3 Q. And you had mentioned earlier that -- the
4 names Union Tank Car's fleet and Procor. Just
5 explain to the jury what Procor -- the difference
6 between Procor and Union Tank Car.

7 A. Well, as I mentioned before, I'm also
8 responsible for Procor, Limited, and they are a
9 Canadian-based company. They lease freight cars,
01:57PM 10 primarily tank cars, in the Canadian marketplace,
11 and functionally they do the same thing in Canada
12 that Union Tank does in the United States.

13 There are some specialty considerations
14 dealing in domestic Canadian leasing and
15 transportation and Procor is expert at handling
16 those things.

17 Q. And as president of the group fleet, are
18 you responsible ultimately for the repair and
19 maintenance of the entire fleet in North America?

01:57PM 20 A. Ultimately accountable to make sure that
21 the fleet continues to operate in a compliant
22 manner.

23 Q. Briefly tell the jury how it is you
24 matriculated to president of the company, or just
25 give a brief history of how you -- your jobs that

1 you worked for at Union Tank.

2 A. When I -- when I started on with Union
3 Tank, I was a trainee, and after six months of
4 becoming familiar with the industry and what the
5 business did, I moved on to a customer service
6 representative position in our Pittsburgh office.
7 That dealt with customers and maintenance issues and
8 railroads and marketing issues, program management.

9 After two years there, I came back to
01:58PM 10 Chicago and took a position doing budgeting,
11 contract renewals, program management, dismantling
12 activity.

13 Moved from there and became manager first
14 and then director of our new-car marketing efforts,
15 which was heavily involved with our manufacturing
16 unit and our engineering folks, and got a deep
17 appreciation for building and engineering cars.

18 From there, I came back into more of a
19 generalized line management role with repair
01:59PM 20 services and railroad services reporting to me, as
21 well as planning, budgeting, market research.

22 And today I have the whole business unit
23 reporting to me, which includes accounting,
24 engineering for the fleet, as well as sales and
25 marketing and portfolio management operations.

1 Q. Now, you didn't -- I noticed that you
2 didn't mention you're an engineer. You're not an
3 engineer, are you?

4 A. No, I'm not a degreed engineer.

5 Q. Does the fleet engineering group report to
6 you?

7 A. They do.

8 Q. Do you routinely interface, interact with
9 fleet engineering?

01:59PM 10 A. Yes. Joe Perez reports directly to me and
11 I interface with both Joe and his reports whenever I
12 want.

13 Q. Through your interface with fleet
14 engineering and in your experience with the company,
15 are you intimately familiar with Union Tank Car's
16 repairs of its fleet and the standards to which
17 we -- you hold the repair units to?

18 A. Yes. Those repair standards, inspection
19 standards and qualification of repair methods come
02:00PM 20 out of Joe's group, and we routinely talk about
21 that.

22 Q. How long has Union Tank Car been operating
23 tank cars?

24 A. The incorporation date for Union Tank Car
25 Company as a standalone entity is back to 1891. So

1 about 127 years at this point.

2 Q. And what is it that Union Tank Car does?

3 A. We -- we build, repair, design, maintain,
4 and own a fleet of railway tank cars.

5 Q. And the headquarters are where?

6 A. We're located -- the headquarters are in
7 Chicago, Illinois.

8 Q. Do you have other locations that Union Tank
9 Car operates?

02:01PM 10 A. Yes. We have two manufacturing locations.
11 The largest is in Alexandria, Louisiana. We have
12 another facility in Sheldon, Texas, which is just
13 outside of Houston, and we have 12 full-service
14 repair shops scattered throughout North America,
15 Canada, United States, as well as one location in
16 Mexico.

17 Q. And the repair shops -- the repair shop
18 that is at issue in the 2013 qualification we've
19 already established is Cleveland, Texas?

02:01PM 20 A. Yes, sir.

21 Q. How many employees does Union Tank Car
22 employ?

23 A. For all our activities, manufacturing,
24 repair, leasing, at this point, the number's roughly
25 3,000 folks in the U.S.

1 Q. Within North America, how many tank cars
2 does Union Tank Car own?

3 A. Within North America, and I'll include the
4 Procor assigned units, but it's 125,000 units at
5 this point.

6 Q. And within just the United States' fleet?

7 A. 100,000.

8 Q. Within North America, how many tank cars
9 are there registered in population for use in
10 interchange?

02:02PM

11 A. There is a facility that's maintained
12 that's -- that has an abbreviation called UMLER, and
13 it stands for Universal Machine Language Equipment
14 Register, and that's how everybody knows that
15 equipment is registered in North America, and that
16 database at the end of 2016 recorded that there was
17 about 418,000 tank cars.

18 Q. And I use the word interchange. Can you
19 just tell the jury in layman's term: What does an
20 interchange mean?

02:03PM

21 A. Interchange is an industry term, but any
22 time you move from an industrial site to a railroad
23 or from one railroad to another railroad, the car,
24 whether it's a tank car or a freight car, is moving
25 in interchange service.

1 Q. What is the primary purpose of a tank car?

2 A. Transporting bulk liquids.

3 Q. What types of bulk liquids or commodities
4 do Union tank cars carry around the United States?

5 A. Well, on the nonhazardous side, one of the
6 larger commodities by volume is vegetable oil. We
7 transport corn syrup in tank cars.

8 On the hazardous material side, asphalt is
9 a very large volume of material moved, as well as
02:04PM 10 gasoline, jet fuel, crude oil, ethenol, and other
11 industrial chemicals.

12 Q. Is one of those chemicals that our cars are
13 approved to carry acrylonitrile?

14 A. Yes.

15 Q. Now, is there also a difference between the
16 classification of cars, general purpose versus
17 pressure cars?

18 A. Yes, there are.

19 Q. Can you explain that to the jury.

02:04PM 20 A. Yes. Many of the commodities that I
21 mentioned earlier, vegetable oil, asphalt, those are
22 carried in general purpose cars. That is a unit
23 that is meant to carry a product that is a liquid at
24 atmospheric pressure.

25 But you also have another class of cars

1 which are called pressure cars, and those are
2 thicker, more robust, stronger cars, and they're
3 used to carry products that would be gases if left
4 to atmosphere and the strength of the vessel
5 contains them and holds them as liquids in
6 transportation.

7 Q. What kind of car was UTLX 901717?

8 A. It was a pressure car.

9 Q. Does Union Tank Car retain the ownership of
02:05PM 10 its leased cars?

11 A. Yes. The equipment that's marked UTLX in
12 our fleet is owned by the company.

13 Q. And was UTLX 901717 a leased car?

14 A. Yes, it was.

15 Q. As part of a full -- well, let me ask you:
16 What type of leases does Union Tank Car offer?

17 A. We offer -- the business model and most of
18 the commercial activity we do is full-service
19 leasing. It's a contractual arrangement where our
02:06PM 20 customers have use of the equipment and we maintain
21 the records and do the administration and are
22 responsible for repairs.

23 Q. As part of the full-service lease, do we
24 maintain financial responsibility for those repairs?

25 A. Yes, we are. And in the absence of abuse

1 or missing material.

2 Q. What does that -- what does that mean?
3 Does that mean if a railroad performs maintenance,
4 we will reimburse them? Explain how that works.

5 A. Certainly. Those repair records that we've
6 seen where the cars were -- the car was in a Union
7 Tank repair facility, those charges were for our
8 account. We tabulated what the cost is but it was
9 our expense.

02:07PM 10 While the car is operating in interchange
11 service and a railroad or multiple railroads are in
12 possession, care and custody of the car, under the
13 rules, they have the right to determine that a
14 repair needs to be performed. They make that repair
15 and they invoice Union Tank Car Company.

16 (Defendant's Exhibit 22 was
17 marked/received into evidence.)

18 BY MR. FLEMING:

19 Q. Now I want to show you Exhibit -- Defense
02:07PM 20 Exhibit 22, and this is a non-objected-to -- in
21 fact, both parties have this on their witness
22 list -- or the exhibit list, and ask to you tell the
23 jury what Exhibit 22 reflects.

24 A. This is a summarization of the repair
25 history experienced by UTLX 901717.

1 Q. And what is the time frame that Exhibit 22
2 encompasses? Is it from -- is it the complete life
3 of the car's history?

4 A. Yes. It reflects all repair events and
5 charges that have been documented from date of
6 construction until the car was removed from service.

7 Q. So, for instance, on this part that's been
8 expanded out, we see that there was some -- the
9 first repairs on this car's history took place when?

02:08PM 10 A. On this line here (indicating) -- that
11 didn't work. January 18th, 1995.

12 Q. And this first page of this multi-page
13 exhibit reflects a number of repairs that were
14 conducted between 1995 and 1999. Who conducted
15 those repairs?

16 A. Multiple railroads. There were entries
17 listed there by CSXT, railroad -- the BN was also
18 listed, and we also have the IC, Illinois Central,
19 going back to October of 1996.

02:09PM 20 Q. And then if we go to the last page of the
21 exhibit, just to get a frame of reference to the
22 time frame, when was -- when was the last repairs
23 performed on UTLX 901717?

24 A. The absolute last line is dated
25 January 27th, 2015, and that was also a railroad

1 repair performed by the CSXT.

2 Q. What was that for?

3 A. The last entry was a Brenco® support which
4 was replaced completely.

5 Q. And prior to that on December 5th, 2014.

6 A. Yes. The next to the last entry is
7 likewise a repair that was initiated by CSXT, and
8 that was the replacement of two brake shoes
9 complete.

02:10PM 10 Q. I want to next show you -- well, let me --
11 before we leave this, when was the most -- what does
12 the third to the last entry reflect?

13 A. Well, that is the final entry from the
14 shopping of the car at the Texas -- Cleveland, Texas
15 in 2013, and it simply highlights the fact that
16 before the car returned to service, it removed a
17 stencil that should not be there when the car was
18 refurbished and returned to service.

19 (Defendant's Exhibit 86 was
02:11PM 20 marked/received into evidence.)

21 BY MR. FLEMING:

22 Q. Next I want to show you Defense Exhibit 86,
23 to which there is no objection, and it's actually a
24 duplicate of Plaintiffs' Exhibit 4, and ask you to
25 explain to the jury what this document shows and why

1 you had this document created.

2 A. As part of our preparation for this
3 proceeding, I wanted to take a look at what our
4 history had been, in terms of wheel change-outs, and
5 so I asked an individual operating within my group
6 in Chicago to look at our record system on wheel
7 change-outs for the three-year period that we see
8 here, and they produced the data in summary form as
9 we see here, which outlines that almost 55,000 wheel
02:12PM 10 sets were changed out in that three-year period
11 reviewed, 2014, '15 and 2016.

12 Q. And does -- how many wheel sets were
13 changed out by the railroads?

14 A. Well, the vast majority of activity was
15 done in the field by railroads. Almost 51,000 of
16 the 54,700 total were performed in the field by
17 railroads operating under the interchange rules.

18 Q. What is the significance of that to you?

19 A. Well, not -- the system works and the
02:13PM 20 interchange set of responsibilities work. Railroads
21 may have applied those wheels, but Union Tank paid
22 for them as being our maintenance responsibility.

23 Q. Before we talk about the specific tank car
24 further, I just -- the jury has heard a lot of
25 acronyms thrown about, and I want to try to put some

1 parameters around some of those and talk about the
2 industry a little bit.

3 How long has the railroad industry been
4 transporting commodities and chemicals in the United
5 States based on your experience?

6 A. Well, there is documented evidence of tank
7 cars moving around back to the 1880's transporting
8 crude oil, kerosene, state-of-the-art commodities
9 such as they were back in the day.

02:13PM 10 Q. Has the industry and the experience -- the
11 experience learned through the industry from that
12 over a century's worth of experience resulted in
13 detailed regulations and rules?

14 A. Absolutely. It's been a continuous
15 evolution of trying to improve safety and efficiency
16 at the railroad level, at the car company level,
17 through car design issues and operating roles.

18 Q. And is Union Tank Car governed by many of
19 those rules?

02:14PM 20 A. All of them.

21 Q. Is it true that Union Tank Car answers to a
22 number of different agencies for the design,
23 manufacture and maintenance of its tank cars?

24 A. Yes, it is.

25 Q. Can you identify those that are what we

1 might call the rule-making side or the enforcement
2 side?

3 A. At the highest level our activities are
4 covered by the Department of Transportation. In the
5 hierarchy of things, the next agency is the Pipeline
6 and Hazardous Material Safety Administration. They
7 govern the transport of hazardous materials through
8 all modes of transportation, truck, rail, water.
9 They're really the group that initiates new
10 rulemaking if a need arises.

02:15PM

11 The Federal Railroad Administration, the
12 FRA, is the enforcement arm. They do
13 investigations. They do audits. They look at
14 records to ensure that participants in this industry
15 are in compliance with the letter and the intent of
16 the rules.

17 Q. Is there anyone else under the FRA?

18 A. Well, there are other groups which play a
19 role in self- -- in safe transportation. NTSB,
20 National Transportation Safety Board, is an
21 independent investigatory body and they make
22 recommendations about how to improve safety.

02:16PM

23 You also have Department of Homeland
24 Security which looks at transportation security, as
25 well as hazardous materials. And then you have TSA,

1 Transportation Safety Administration.

2 Q. The jury has heard a lot about the AAR.
3 What does the AAR stand for?

4 A. It's the Association of American Railroads.

5 Q. By its name, it implies that it's made up
6 of just railroads. Are there other members?

7 A. No. I mean, all the Class I railroads, the
8 largest railroads, Norfolk Southern, CSX, are
9 obviously members. But Union Tank is an associate
02:16PM 10 member at the gold level because of our size and our
11 participation in various activities that AAR
12 sponsors.

13 Q. Are we members of any committees?

14 A. Joe Perez is a member of the tank car
15 committee, which is focused on design and
16 maintenance issues on tank cars.

17 We have UTC representation on the
18 arbitration committee, and we have representatives
19 sitting in on many of the other equipment-related
02:17PM 20 committees.

21 Q. As part of its membership, did Union Tank
22 Car agree to be bound by the AAR rules?

23 A. Yes. A long time ago, because Union Tank
24 has been in the industry a long time, we signed off
25 and pledged to be -- to abide by the interchange

1 rules, along with all the other Class I railroads.

2 Q. And how are the AAR interchange rules
3 communicated to the members like Union Tank Car?

4 A. Well, there is two primary methods of
5 communication. There is the field manual of
6 interchange rules which AAR updates routinely to
7 expand, clarify standing rules. That's a guide
8 that's used in day-to-day operations in the field by
9 our folks in the repair shops, as well as folks
02:18PM 10 working out on the railroad on a day-to-day basis.

11 There is another major publication which is
12 the office manual of the interchange rules, and that
13 deals with definitions. It highlights updates to
14 labor and material charges and is really an
15 accounting and back-office manual in terms of
16 communicating and handling things that are
17 transpiring between various members and folks that
18 are signed up to the interchange rules.

19 Q. Now, you've mentioned the field manual and
02:19PM 20 we've talked about a number of the rules from the
21 field manual already, but I do want to show the jury
22 Exhibit 111, to which there is no objection and it's
23 already been discussed.

24 Just for purposes of identifying, and
25 sparing them the detail of going through the

1 entirety of the manual, what does Exhibit 111
2 reflect?

3 A. That is the cover sheet of the 2013 edition
4 of the AA- -- the field manual of the interchange
5 rules.

6 Q. And if we turn to the third page --

7 MR. FLEMING: Oops.

8 Can you just highlight the effective date,
9 Ms. Bauer.

02:20PM 10 BY MR. FLEMING:

11 Q. Mr. Constantino, what is the effective date
12 of this document?

13 A. July 1, 2013.

14 Q. Does that indicate that this version,
15 Exhibit 111, was in effect at the time we performed
16 our qualification?

17 A. Yes.

18 Q. Those rules would have been the rules
19 governing our qualification or performance of Rule
02:20PM 20 36 and Rule 88 inspections?

21 A. Yes, and the operation of the car in the
22 field thereafter, yes.

23 (Defendant's Exhibit 112 was
24 marked/received into evidence.)

25

1 BY MR. FLEMING:

2 Q. And you next mentioned the office manual,
3 and, again, without -- well, sparing the jury the
4 detail, I'd like to show Exhibit 112, to which there
5 is no objection, just to identify it for the record,
6 and ask you to tell the jury if this is the
7 effective version for 2013 of the office manual.

8 A. Yes. This -- this version was initially
9 effective January 1, but then a change went through,
02:21PM 10 and that change was effective April 1 of 2013. So
11 it would have applied for the shopping that occurred
12 later in the year.

13 Q. Now, where are the Why Made Codes located
14 that we've talked a little bit about?

15 A. They are in both locations, both -- both in
16 the office manual, as well as the field manual.

17 Q. Are there also manuals of recommended
18 standards and practices that apply that are
19 promulgated by the AAR?

02:21PM 20 A. There certainly are, yes, sir.

21 Q. And we already discussed, and I won't
22 repeat, Exhibit 148, which is M-934. Is that just
23 one example of the many standards that exist in the
24 AAR manuals?

25 A. Yes, sir.

1 Q. So what's the legal life of a tank car?

2 A. The maximum legal life is 50 years.

3 Q. And where do we find that?

4 A. You would find that outlined in Rule 88 of
5 the field manual.

6 Q. And, again, that's Rule -- that's
7 Exhibit 111, Rule 88.

8 MR. FLEMING: And if you -- Ms. Bauer, if
9 you would highlight Age or Section A down to Age.

02:22PM 10 There you go.

11 BY MR. FLEMING:

12 Q. Mr. Constantino, what does the AAR -- is
13 this just confirmation of what you just told the
14 jury that --

15 A. Yes, it is.

16 Q. And so the 50 years applies to any car that
17 was built after 1974?

18 A. That's correct.

19 Q. Can the life of a tank car be extended by
02:22PM 20 qualification?

21 A. Not beyond the 50 years called for in Rule
22 88, no, sir.

23 Q. Is there a difference between tank cars and
24 freight cars, high-utilization cars?

25 A. Yes, tank cars generally move fewer miles

1 on an annual basis than many other types of freight
2 cars. You have coal unit trains. You have grain
3 unit trains. You have intermodal flat cars that are
4 moving coast to coast and they generate very high
5 miles.

6 But on the tank car side of things, that's
7 not the typical use for any tank car and wasn't for
8 this tank car.

9 Q. What is the typical use for a tank car?

02:23PM 10 A. Well, industry statistics supplied by the
11 AAR, once again, because they have access to
12 information on everything, suggests that the average
13 tank car moves about 18,000 miles a year, empty and
14 loaded.

15 Q. And is that consistent with the information
16 on Union Tank Car's own fleet?

17 A. Yes.

18 Q. Are Union tank cars also at times used as
19 storage vessels for customers?

02:24PM 20 A. They are, and that is at the choice of the
21 customer, but they can be, yes.

22 Q. Is that part of the reason why the mileage
23 can be lower at times?

24 A. Certainly, yes.

25 Q. Does Union Tank Car manufacture all the

1 parts that end up on its tank cars?

2 A. No.

3 Q. Where do we get them?

4 A. We purchase the parts that we need to
5 complete the total car from other AAR-certified
6 vendors.

7 Q. Can Union Tank Car buy components that
8 require AAR approval from any company that
9 manufactures railcar components?

02:25PM 10 A. To the extent that somebody can demonstrate
11 that they are a certified supplier of an approved
12 item, we would treat them as a possible supplier to
13 us, yes.

14 Q. And was -- do you know who Amsted is?

15 A. Yes.

16 Q. Who is Amsted or what is Amsted?

17 A. Amsted is a supplier of many different
18 types of railroad components but chiefly, as it
19 applies here, of roller bearings.

02:25PM 20 Q. And do you understand that Amsted's Brenco®
21 roller bearings had achieved AAR approval?

22 A. They were AAR approved for application and
23 use on railroad freight cars, not just tank cars.

24 Q. When were the Brenco® bearings that we --
25 that are at issue in this case that were found on

1 the wheel set No. 3 manufactured?

2 A. 1994, as I believe they were original
3 equipment applied to the car when it was built.

4 Q. I should have asked it different. Were
5 they installed in 1994 on the tank car at issue?

6 A. Yes.

7 Q. And I want you to assume that Mr. Norris
8 testified that Brenco® or Amsted's bearings had
9 received unconditional approval from the AAR prior
02:26PM 10 to 1994. Does that confirm for you that the Brenco®
11 bearings were approved for use in 1994 by the AAR?

12 A. Yes.

13 Q. And as a consequence, Brenco® would have
14 had to show the AAR that it complied with Section
15 M-934; do you agree?

16 MR. FRIEDMAN: Your Honor, object to this.
17 There has not been sufficient foundation laid for
18 this testimony. He is not testifying from the
19 standpoint of a bearing manufacturer, and there has
02:27PM 20 been absolutely no evidence of what Brenco® would
21 have had to represent to a third-party.

22 MR. FLEMING: Your Honor, I'll withdraw and
23 move on to something else.

24 THE COURT: Thank you.

25

1 BY MR. FLEMING:

2 Q. Does the AAR monitor performance and issue
3 directives about certain products that it has
4 approved?

5 A. Yes, they do. They do monitor and have a
6 reporting system of what reliability and consumption
7 is for parts that have entered into use on
8 railroads.

9 Q. And do those directives sometimes require
02:28PM 10 products to be removed from use?

11 A. Sometimes, yes, sir, they do.

12 Q. I want to go back up to Union Tank Car
13 Exhibit No. 14 that's been admitted into evidence
14 and draw your attention to the entry on line number
15 16, Wheels and Axles. Could you explain to the jury
16 what the significance of that entry is.

17 A. Yes. Again, this is an inbound inspection
18 document, so kind of the first eyes on the car when
19 it has arrived on the property. And that inspector
02:28PM 20 is looking at the wheels and axles that are mounted
21 on the car at that time.

22 And they do note here that the No. 4 wheel
23 set was of Southern manufacture, and it does record
24 Why Made Code of 70 which calls for the removal of a
25 Southern wheel.

1 Q. Well, help the jury understand better.
2 What was the issue or what was the AAR directive
3 telling Union Tank Car to do at that time with
4 Southern wheels?

5 A. Well, back -- the AAR and the individual
6 reporting roads had been monitoring the performance
7 of wheels produced by that particular manufacturer,
8 who has since gone out of business, and they
9 determined that the wheels themselves were not
02:29PM 10 reliable and up to snuff, if you will.

11 And after discussion, the AAR put out what
12 we call in the industry a maintenance advisory
13 indicating to all folks in the system that they
14 should be removed on-site the next time the car got
15 to a repair location or repair track and it was
16 inspected and found to have wheels built by
17 Southern. They were to be removed and replaced, and
18 that's what happened. And that -- that process
19 started in mid 2011, and the -- as I recall, the
02:30PM 20 maintenance advisory actually came out in August of
21 2011.

22 Q. And there was an actual separate Why Made
23 Code for that particular item?

24 A. In the course of setting out the
25 maintenance advisory, AAR did want to highlight and

1 track as those wheels were taken out of service, and
2 they did establish a separate Why Made Code, yes,
3 sir.

4 Q. What's the significance of this example?

5 A. Well, it certainly highlights the fact that
6 the inbound inspector is paying attention and
7 looking in detail at castings and wheels and he's in
8 close proximity to the bearings at all the locations
9 across the car. And based on the clear visual
02:31PM 10 evidence associated with that one wheel set, he
11 marked it to be removed.

12 Q. Does it also reflect that the AAR is
13 monitoring the equipment in service?

14 A. Yes. It's only one of many examples, as I
15 said before, where the system works; that when
16 enough data is collected to bring into question the
17 reliability of a component that's in service, the
18 AAR will move to ensure that there is expedited
19 removal of those components from service.

02:32PM 20 Q. Based on your experience, 40 years in the
21 industry, are you confident that the AAR would do
22 the same thing if warranted on journal bearings?

23 A. Yes, without question.

24 Q. We've heard about journal bearings for the
25 last several days being referred to as no field

1 lubrication or no field lubricant bearings or NFL.

2 What does that mean?

3 A. That the approval of the bearing and the
4 design of the bearing is predicated on the fact that
5 it not need maintenance in the field.

6 Q. Is Union Tank Car at its repair shops even
7 permitted to perform maintenance beyond the Rule 36
8 or visual inspections that it performs on the roller
9 bearings?

02:33PM 10 A. No, that is a different class of
11 certification. In order to be a re-conditioner of
12 wheels and/or roller bearings, you have to comply
13 with a different set of standards, and Union Tank
14 does not perform those activities in our repair shop
15 network.

16 Q. In fact, if Union Tank Car were to break
17 the seal of the lub- -- of the NFL bearing while it
18 had it in its possession to take a look inside, what
19 would have to happen?

02:33PM 20 A. It would require the removal of that wheel
21 set from service.

22 (Defendant's Exhibit 2 was
23 marked/received into evidence.)

24 BY MR. FLEMING:

25 Q. Let's talk specifically about the UTLX

1 901717. I want to show you Exhibit 2, Defendant's
2 Exhibit 2, and just ask you -- and we'll expand it
3 where needed. Look at the top first. But could you
4 tell the jury what this document reflects.

5 A. Every time an approved manufacturer of tank
6 cars intends to build a new production run of a
7 particular cartridge type, we need to file an
8 application with the Association of American
9 Railroads, and this is almost like a birth
02:34PM 10 certificate. It is a certificate of construction.

11 This is where we highlight to the AAR, who
12 is the approving authority, how we intend to build a
13 particular set of tank cars and before we put them
14 into service.

15 Q. And when was this certificate of
16 construction first submitted to the AAR?

17 A. The date of this was June 29th of 1994.

18 Q. And is this the application that applies to
19 the tank car in question based on the car numbers?

02:35PM 20 A. Yes. If you look to line 9, you'll see the
21 car number series would include 9017117 (sic).

22 Q. And what was the -- what was the initial
23 commodity that was -- we were seeking approval to
24 carry?

25 A. On line 11, you'll see acrylonitrile was

1 the commodity originally planned for these cars
2 after they were built and put into service.

3 Q. And then was this -- did the tank car
4 committee of the AAR ultimately approve the
5 application?

6 A. They did. There is signature -- three
7 signature blocks at the bottom of this document, but
8 what you're referring to is a B. J. Pague, secretary
9 to the tank car committee of the AAR, acknowledging
02:36PM 10 acceptance and approval of this application by Union
11 Tank, and that was done September 20th, 1994.

12 Q. Does that give Union Tank Car permission to
13 build and release these cars?

14 A. Yes.

15 (Defendant's Exhibit 17 was
16 marked/received into evidence.)

17 BY MR. FLEMING:

18 Q. Next I want to just briefly discuss Defense
19 Exhibit 17, to which there is no objection, and
02:36PM 20 corresponding Plaintiffs' Exhibit 48, and just ask
21 you briefly to identify the Union Tank Car Car
22 Service Agreement for the jury. What does this
23 document reflect?

24 A. Yes. This is our master lease agreement
25 that we have in effect between our customers and

1 Union Tank.

2 Q. And if we turn to -- well, let me ask you:
3 Who are the parties to this lease?

4 A. Union Tank Car Company and Innovene, LLC,
5 which is a predecessor of INEOS.

6 Q. And based on your understanding of the
7 lease history of this car, had it been on continuous
8 lease since 1994 to the same entity or its successor
9 entities?

02:37PM 10 A. Yes. It started off with B.P. Chemicals
11 and went from B.P. Chemicals to Innovene and then
12 from Innovene to INEOS, always in the same product
13 service, always in the same area of operation.

14 Q. And if we turn to Rider No. 7, two things I
15 want to draw out. One, if you can identify the cars
16 that are the subject. What does this rider
17 demonstrate?

18 A. Well, let me take one step back, and as
19 we're assigning individual cars, we're issuing
02:38PM 20 contract riders, and this is a contract rider to our
21 car service agreement. It highlights economic
22 issues, but it does highlight here cars assigned,
23 and 901717 is one of the 15 cars assigned to this
24 contract rider.

25 Q. And did you sign off on this?

1 A. I did, yes.

2 Q. That's your signature down at the bottom?

3 A. Yes.

4 Q. At the time we released the car or leased
5 it to B.P. Chemical in 19- -- end of 1994, when was
6 the next time we saw the car?

7 A. When it was shopped at our facility in
8 2004.

9 (Defendant's Exhibit 87 was
10 marked/received into evidence.)

02:39PM

11 BY MR. FLEMING:

12 Q. And if we look at Exhibit 87 -- well, let
13 me -- before I look at 87, was this the first
14 qualification that was called for following the
15 manufacture or the build date?

16 A. That would have been the 10-year interval,
17 and it would have been the first time we would have
18 seen the car in a shop environment and gave us the
19 opportunity to do the qualification.

02:39PM

20 Q. And where was that qualification performed?

21 A. At our facility at El Dorado, Kansas.

22 Q. We've already talked in some regard to the
23 2004 qualification, but I do want to look at Defense
24 Exhibit 87, to which there is no objection, which is
25 also Plaintiffs' Exhibit 5, and just ask you to

1 identify this document for the jury.

2 A. It is the 88.b checklist of items that are
3 reviewed when a car is undergoing qualification or
4 the 88.b inspection itself.

5 Q. And similar to what we already looked at
6 with respect to the 2013 88.b inspection, what does
7 this document demonstrate about the wheel bearings
8 in this case in 2004?

9 A. That they likewise were reviewed as part of
02:40PM 10 the 88.b and they passed and no repair was required.

11 Q. Would this 88.b inspection be where the
12 Rule 36 inspection would have been performed?

13 A. Yes.

14 Q. And just to reiterate, through your review
15 of the 2004 qualification or car file, did you see
16 any record that indicated or suggested that this car
17 had been submerged prior to our service in 2004?

18 A. No. There is no annotation, no record, no
19 suggestion at all that this car experienced such an
02:41PM 20 event.

21 Q. And are our technicians required to look
22 for such evidence?

23 A. They are inspecting all the components and
24 the car in general. Not that anybody would think
25 about cars being submerged arriving at the shop, but

1 they would look, and if there was evidence, they
2 would address it.

3 Q. Why wouldn't they think about it?

4 A. Because, again, as we've talked about, if
5 that car experienced an event where the bearings had
6 been submerged, those wheels would have been
7 exchanged in the field, and they weren't.

8 Q. And is that because, as you testified
9 earlier, they're not allowed to move until they're
10 replaced?

02:41PM

11 A. Exactly. Yes, sir.

12 Q. When was the -- and if you need me to show
13 you Exhibit 22 again, I'm happy to, but when was the
14 next time we saw the tank car?

15 A. 2010.

16 Q. What did we -- what work was done in 2010?

17 A. The shopping at Cleveland, Texas in 2010
18 was the result of the customer wishing some of the
19 valves be altered and that we perform an interior
20 preparation regime, which we did while the car was
21 there.

02:42PM

22 Now, while it was there, we also did an
23 interchange inspection, made sure everything was in
24 compliance and any other repairs that were in
25 evidence before we returned the car to service.

1 Q. Have you reviewed the 2010 car shop file?

2 A. Yes.

3 Q. Was there any indication in the 2010 car
4 shop file that the car had been submerged or in any
5 way didn't pass inspection?

6 A. No.

7 Q. Let me withdraw it and ask it a different
8 way.

9 Was there any indication in the 2010 car
02:43PM 10 shop file that the car had been submerged?

11 A. None.

12 Q. And then the next time we saw for
13 qualification was when?

14 A. In 2013.

15 Q. Three years later?

16 A. Yes.

17 (Defendant's Exhibit 13 was
18 marked/received into evidence.)

19 BY MR. FLEMING:

02:43PM 20 Q. I know we've already discussed this, so I'm
21 just going to confirm a few points. I'd like to put
22 in front of you Defense Exhibit 13, to which there
23 is no objection. I'm just looking at the first
24 page. Can you tell the jury what Exhibit 13 is
25 comprised of or what it is.

1 A. This is a -- again, a checklist of all the
2 different operations to be performed while the car
3 is in the repair shop.

4 Q. Let me stop you. Is Exhibit 13 the entire
5 car shop file for that event?

6 A. No, not at all.

7 Q. Okay. What does Exhibit 13 contain?

8 A. It is simply the checklist of those
9 operations that need to be performed while the car
10 is going through the repair shop.

02:44PM

11 Q. Does the car file go along with the car
12 during qualification?

13 A. Yes, it does follow the car at all the
14 different workstations that the car sees while
15 qualified, inspected and attended to.

16 Q. Within the car file, is there a tank car
17 data report?

18 A. Yes.

19 Q. And that is going to be the next document
20 from the car -- from Exhibit 13 that I want to talk
21 about.

02:44PM

22 MR. FLEMING: Can you just highlight the
23 car number, Ms. Bauer, up at the top left, and
24 expand that so that everyone can see.

25

1 BY MR. FLEMING:

2 Q. Does it -- as she is doing that, does this
3 reflect that this is, in fact, the tank car data
4 report for UTLX 901717?

5 A. Yes, sir, it does.

6 Q. Within that document, is the
7 information -- is the tank car build date also
8 reflected?

9 A. It is.

02:45PM 10 Q. Where is the data from this document
11 generated? Where did we generate the data from?

12 A. Some of the information comes from our own
13 internal mechanical record system and some of the
14 data is imported from both UMLER and Rail Link,
15 another industry source of data.

16 Q. And at the time of this qualification in
17 2013, did this data that's populated also include
18 the total miles on the car as of 2013 or the
19 shopping event in August through October of 2013?

02:46PM 20 A. Yes, sir, it did.

21 Q. What was the total miles reflected at this
22 point on that car?

23 A. The number displayed here is 193,763 miles.

24 Q. Have you, as part of your preparation
25 today, also studied other information to try to

1 arrive at the average mileage that this tank car
2 might have seen or has seen?

3 A. We did take a look at the mileage history
4 for our entire fleet of cars of this type just as a
5 step one. And then we also took a look at the
6 population, the group of cars that had been assigned
7 continuously to the same service, B.P., Innovene,
8 INEOS, and looked at the mileage accumulated there,
9 yes.

02:46PM 10 (Defendant's Exhibit 93 was
11 marked/received into evidence.)

12 BY MR. FLEMING:

13 Q. Let me give you -- let me put up in front
14 of you Defense Exhibit 93, to which there is no
15 objection, also Plaintiffs' Exhibit 25, and just ask
16 you -- we'll expand it for you.

17 Why don't you explain to the jury what you
18 had done and what this data shows.

19 A. Well, the top, the full fleet study, is, as
02:47PM 20 I said, all -- all cars of this particular type, and
21 that fleet average, total miles came in at a little
22 under 14,000 miles per year; 13,783.

23 And then with that as the foundation, we
24 took a look at the separate INEOS fleet, cars that
25 had been in continuous service, as I said before,

1 and that mileage history averaged out to 10,821
2 miles per year as an average; 11,000 miles a year.

3 Q. And based on the 190,700 miles we saw on
4 the previous exhibit, is that consistent with what
5 your findings were?

6 A. The math tracks, yes, sir.

7 Q. And based on that average, how many miles
8 would you have expected that this car had on it on
9 the day of this incident, July 1st, 2015?

02:48PM 10 A. Well, it was approximately 21 years old.
11 So right around 220,000 miles total, total life to
12 date.

13 Q. Mr. Constantino -- hang on one second.
14 I'll clear the screen.

15 Mr. Constantino, we talked about your
16 removal -- Union Tank Car's removal of the Southern
17 wheel set during that 2013 qualification. Why
18 didn't Union Tank Car replace all the wheel sets at
19 that time?

02:48PM 20 A. Well, we inspected all the wheels and found
21 cause to only replace one. The others were in
22 conformance with all the rules at that point in time
23 and had remaining service life, and -- and there
24 wasn't any reason to waste the utility that was
25 still in that equipment.

1 Q. Does Union Tank Car have the ability to
2 identify the age of bearings through things like
3 visual inspections and other avenues of research?

4 A. Yes.

5 Q. Can you explain some of those.

6 A. Well, we do know the date of manufacture or
7 reconditioning on bearings that are installed,
8 whether it's a new car or a car that we're
9 repairing.

02:49PM 10 We -- when it's done in the field, most of
11 the time we only know that the wheels have been
12 changed and we know that the bearings have been
13 changed along with the wheels. We don't necessarily
14 get a report of age from the field location. But
15 our database is built to tell us when wheel
16 change-outs are made, and to the extent we've
17 captured bearing data, we maintain it.

18 Q. I want to talk, before we conclude, about
19 the actual incident.

02:50PM 20 How did Union Tank Car learn that there had
21 been a derailment of 901- -- well, of the train
22 carrying 901717?

23 A. We picked up media reporting initially that
24 there had been a derailment and we started to make
25 inquiries of AAR, as well as the railroad, to try to

1 determine whether or not we were directly involved.

2 Q. Were you personally involved in some of
3 those communications?

4 A. No, I did not talk with AAR or CSX. I had
5 Joe Perez talk to the various regulators, and we
6 have an AAR services group who routinely contacts
7 with the railroads, and they reached out to CSX for
8 any information that they would give us at that
9 point in time.

02:51PM 10 Q. And during the course of the day, July 2nd,
11 after finding out, was Union Tank Car asked to
12 provide information by CSX and the FRA?

13 A. Yes. At the same time they -- they --
14 those bodies, FRA and the railroad, communicated to
15 us that we were directly involved, they made
16 requests of us for -- for information; what kind of
17 car was it and what was the maintenance history;
18 produce documentation, and all the requests for
19 information that were made of us, we complied with.

02:52PM 20 MR. FLEMING: Before we ask the -- can you
21 put up Defense Exhibit No. 20, to which there is no
22 objection.

23 (Defendant's Exhibit 20 was
24 marked/received into evidence.)

25

1 BY MR. FLEMING:

2 Q. And I just want you to tell the jury what
3 these records are that we're looking at in
4 Exhibit 20.

5 A. Well, we maintain a lot of files that we've
6 talked about today. This one is a railroad damage
7 file which is maintained in the Chicago office. It
8 outlines the course of events associated with a car
9 that's been railroad damaged and how that situation
10 is ultimately resolved.

02:53PM

11 Q. And what's the significance of these
12 documents? I mean, what does it -- what do these
13 documents reflect?

14 A. Well, it reflects, number one, that the car
15 has been damaged. Number two, that the railroad has
16 taken responsibility for the damage. And then there
17 is an economic reconciliation pursuant to the rules.
18 The railroad either pays the repair costs or pays
19 the depreciated value in the event a car has been
20 destroyed.

02:53PM

21 Q. And if we turn into this document to the
22 second to the last page, looking at this document,
23 can you tell the jury what this invoice reflects.

24 A. This is the Union Tank Car invoice tendered
25 to CSX Transportation for the month of July 2015,

1 and it says it's for AAR repairs.

2 Q. Turning to the next page, just looking at
3 the highlighted tank cars, can you tell the jury
4 what the significance of those two tank car numbers
5 are within this July invoice.

6 A. Well, UTLX 901717 is why we're here. The
7 companion car was traveling with the incident car,
8 and CSX settled under AAR interchange Rule 107 and
9 paid us the depreciated value for both of those --
02:55PM 10 both of those tanks.

11 Q. And is that the value identified in
12 this ex- --

13 A. Yes.

14 Q. \$60,061 for 901717 and \$59,498 for --

15 A. That's -- that's correct.

16 Q. -- 901708?

17 A. Yes.

18 Q. None of the -- just so the jury is not
19 confused, none of the other cars listed on

02:55PM 20 Exhibit 20 have anything to do with this incident;
21 correct?

22 A. They do not. They were other cars damaged
23 at other locations and other dates that were just
24 part of the monthly settlement.

25 Q. You testified that the FRA and CSX were

1 leading the investigation. Are you aware that the
2 FRA completed its investigation and issued a summary
3 report of the incident?

4 A. Yes, sir, they have completed their
5 investigation.

6 Q. Following the completion of that report,
7 were -- at any time prior to that has the FRA issued
8 a violation notice to Union Tank Car or otherwise
9 criticized or penalized Union Tank Car Company?

02:56PM 10 A. No, there has been no fine levied, citation
11 to Union Tank related to this event.

12 MR. FLEMING: Your witness.

13 THE COURT: Thank you. Cross-examination.

14 MR. FRIEDMAN: May it please the Court.

15 We need just a minute to change over.

16 CROSS-EXAMINATION

17 BY MR. FRIEDMAN:

18 Q. Mr. Constantino, we've never met. My name
19 is Jeff Friedman. I've read your deposition and
02:56PM 20 I've heard your testimony. Let's cover a few
21 things, if we can, just on a preliminary basis.

22 You are here today speaking on behalf of
23 Union Tank Company; right?

24 A. Yes, sir.

25 Q. You're not speaking in your personal

1 capacity; you're speaking on behalf of the company?

2 A. That's correct.

3 Q. And you've done that frequently in the
4 past, haven't you?

5 A. I wouldn't say frequently, but I have --

6 Q. A number of times?

7 A. -- testified in the past.

8 Q. And when a legal matter like this comes up,
9 typically you're the person that the company turns
10 to; right?

02:57PM

11 A. Yes, sir.

12 Q. Okay. And you're an executive with Union
13 Tank Company; correct?

14 A. Yes.

15 Q. You had no education in engineering?

16 A. No, sir, just practical experience.

17 Q. Right. When you say "practical
18 experience," you've never personally done a Rule 36
19 inspection, have you?

02:57PM

20 A. No.

21 Q. You've never gotten dirt, grease under your
22 fingers getting down there and doing a Rule 88, have
23 you?

24 A. I have been to our repair shops, but I'm
25 not certified, nor trained to do those inspections.

1 I've witnessed them being done.

2 Q. Sure. You've watched.

3 And when you talk about and you tell the
4 jury what we saw down there in Texas at Union Tank's
5 shop, you personally didn't see anything, did you,
6 sir?

7 A. No. What the documents that we've
8 discussed display to me and confirm.

9 Q. You are looking at shop documents and then
02:58PM 10 interpreting them in coming up with a conclusion as
11 to what those people down there saw or didn't see;
12 correct?

13 A. Yes.

14 Q. And you've never met with those work crews
15 down there, have you, about this case?

16 A. No.

17 Q. And you know, though, who they are, don't
18 you, because their names are on the documents?

19 A. I know some of the individuals, yes.

02:58PM 20 Q. And you knew this case was pending; you
21 knew you were going to be talking about the repair
22 work and you knew you were going to face this jury,
23 didn't you?

24 A. Yes, sir.

25 Q. And you never took time to talk to a single

1 one of those people down there in Texas who actually
2 did the work?

3 A. Well, some of the individuals are no longer
4 employed by Union Tank going back to the 2004
5 history.

6 Q. Well, let me make it fair then. There is
7 still people there who were there at the 2013
8 qualification; right?

9 A. Yes.

02:59PM 10 Q. No question of that because we asked about
11 some of them.

12 A. Yes.

13 Q. And they're still there.

14 A. Yes.

15 Q. And you didn't talk to them.

16 A. No.

17 Q. All right. You never served on the -- on
18 any federal hazardous material board or agency, have
19 you?

02:59PM 20 A. No, I have not.

21 Q. You've never written or published any
22 papers concerning railroad safety or maintenance?

23 A. No.

24 Q. You've never worked or served under any
25 Federal Railroad Administration committees?

1 A. No, I have not been employed in any
2 capacity by the FRA.

3 Q. Well, you can serve on the committees
4 without being employed by them; right?

5 A. I'm not aware of any committees sponsored
6 by the Federal Railroad Administration.

7 Q. You have no formal education in industrial
8 hygiene?

9 A. Correct.

03:00PM 10 Q. Chemistry?

11 A. No.

12 Q. Never worked and done any kind of analysis
13 with grease or lubricants, have you?

14 A. No.

15 Q. You're not an expert in railroad tanker car
16 design?

17 A. I have plenty of practical experience in
18 tank car design, yes, sir. I'm very familiar with
19 tank car design.

03:00PM 20 Q. All right. I get that you're familiar, but
21 you've never actually designed a car.

22 A. No. As I said, I'm not an engineer.

23 Q. And -- well, let me just get to something
24 then. I think we've laid a little background. Let
25 me just get to something that's been brought up in

1 your direct examination.

2 The lawyer for Union Tank talked about they
3 never heard anything about this tanker car being
4 submerged or being wet back in 2004. You were asked
5 questions about that; right?

6 A. Yes, sir.

7 Q. As a matter of fact, when you gave your
8 deposition in August, August 30th of 2017, you
9 testified extensively about submerged tankers,
10 didn't you?

03:01PM

11 A. We had a conversation about the rules and I
12 produced a document which was our communication to
13 our folks with respect to Hurricane Harvey which had
14 recently affected the Houston area, yes.

15 Q. And as a matter of fact, one of the
16 statements you made in your deposition, that is, if
17 your equipment has been subjected to flooding, that
18 calls in a requirement under Rule 36 to change out
19 any roller bearings that have been subjected to
20 flooding or submerged; correct?

03:02PM

21 A. Yes.

22 Q. All right. Now, at that point in August of
23 2017, Union Tank Car had not given us their
24 documents on the 2004 --

25 MR. FLEMING: Your Honor --

1 MR. FRIEDMAN: Let me finish my question,
2 please.

3 BY MR. FRIEDMAN:

4 Q. Union Tank Car had not given us the
5 document on the first requalification.

6 MR. FLEMING: Your Honor, he's violating a
7 Motion in Limine that was specifically filed on
8 discovery document productions; not to mention, I
9 don't believe the timing of that representation is
10 accurate at all.

03:02PM

11 MR. FRIEDMAN: Your Honor, I'm responding
12 to a personal attack they made on me. We did not
13 have the first requalification documents when we
14 took his deposition.

15 THE COURT: Well, the objection -- and I'm
16 not going to get into lawyer attacks. The objection
17 is it goes beyond what's allowed by a Motion in
18 Limine, and I don't recall that sitting right
19 here --

03:03PM

20 MR. FRIEDMAN: Your Honor --

21 THE COURT: -- in response to that.

22 MR. FRIEDMAN: -- I don't recall it either.
23 I'll try to rephrase my question.

24 THE COURT: Either that, or why don't
25 you -- if you can hold this subject matter or this

1 question until a break, we can look into that. I
2 mean, you can try to rephrase it and see if there is
3 any objection. I'll have to go back and --

4 MR. FRIEDMAN: All right. I'll rephrase
5 it. I think I can overcome that objection.

6 THE COURT: Go ahead.

7 BY MR. FRIEDMAN:

8 Q. Mr. Constantino, do you remember being
9 asked any questions about the first requalification
03:03PM 10 in your deposition? And if you need to see it, I'll
11 give it to you.

12 A. I would appreciate that, yes.

13 Q. Okay. You don't recall one way or another
14 whether you were asked?

15 A. No, I don't.

16 Q. All right. Then I'll give you an
17 opportunity to look at it and we'll follow Your
18 Honor's instruction and come back to it.

19 Now, you did testify, though, that any
03:03PM 20 bearing that's submerged, roller bearing, must be
21 attended to immediately; right?

22 A. Yes.

23 Q. Or if it comes to the attention of Union
24 Tank Car, Union Tank Car must attend to it
25 immediately?

1 A. Correct.

2 Q. There is no wiggle room in that; right?

3 A. No, no.

4 Q. All right. Let's look then, if we can --

5 MR. FRIEDMAN: Mr. Davis, would you bring
6 up Plaintiffs' 2. This is going to be the --
7 Plaintiffs' 2 is that diagram of the Union Tank Car
8 tanker.

9 (Plaintiffs' Exhibit 2 was
10 marked/received into evidence.)

03:04PM

11 BY MR. FRIEDMAN:

12 Q. Can you see that, Mr. Constantino?

13 A. Yes, sir.

14 Q. All right. Now, just as a -- just as a
15 matter of orientation, the tanker car itself sits on
16 top of the trucks; would you agree with me?

17 A. That's correct, yes.

18 Q. And if you were -- if you were going to
19 drain a -- the insulation of a tanker, and I believe
20 this is specified in the work notes, but it's
21 drained at the very bottom?

03:05PM

22 A. The bottom centerline of the car, yes, sir.

23 Q. All right. Now, as far as the -- the
24 roller bearing -- I want to get the right
25 nomenclature here.

1 As far as the roller bearing brackets,
2 those brackets would sit --

3 MR. FRIEDMAN: Can you bring up -- can you
4 bring that up?

5 BY MR. FRIEDMAN:

6 Q. The roller bearing brackets, they
7 are -- they sit right on -- they are located right
8 on top of the roller bearings; is that correct?

9 A. If you're addressing the roller bearing
03:05PM 10 adapters --

11 Q. Yes.

12 A. -- yes.

13 Q. Could you point those out to the ladies and
14 gentlemen of the jury, the adapters. We see the
15 roller bearings. The adapter should be right behind
16 it and a little bit above them.

17 A. Right. If we look here (indicating), it is
18 the blue area that sits on top of -- of the bearing.

19 Q. All right. Now, if water had gotten up to
03:06PM 20 those roller bearings or the roller bearing adapter
21 to the point that it would cause them to rust, the
22 roller bearings themselves would be submerged,
23 wouldn't they?

24 A. No. Rain. Those roller bearing adapters
25 do not sit in a covered, sheltered area. Rain, snow

1 does not -- it's not evidence of submersion by any
2 stretch of the imagination.

3 Q. I don't think you understood my question.

4 If water were to submerge those adapters,
5 it would have to be at such a level that it would
6 rise above the roller bearings themselves, wouldn't
7 it?

8 A. Yes.

9 Q. All right. Now, we talked about these
03:07PM 10 documents, and let me go through them real quickly.
11 There is Plaintiffs' 144.

12 Now --

13 MR. FRIEDMAN: And, Mr. Davis, could you
14 bring that up right in the middle of that.

15 BY MR. FRIEDMAN:

16 Q. Can you identify this Exhibit 144 for us,
17 Mr. Constantino? That's the worksheet; right?

18 A. This is the truck assembly conventional
19 document. This is part of, once again, the inbound
03:08PM 20 inspection document --

21 Q. Right.

22 A. -- that we talked about earlier.

23 Q. Right, that you talked about.

24 And this is a Union Tank Car document;
25 right?

1 A. Yes.

2 Q. And just for the ladies and gentlemen of
3 the jury, when these requalifications are done by
4 Union Tank, that's not done by the railroad and
5 that's not done by a lease or a lessee. I mean,
6 that's your responsibility; right? When I say
7 "your," I'm talking about Union Tank.

8 A. Right. But Union Tank Car is typically
9 called the lessor of this equipment. So --

03:08PM 10 Q. You're right. Yeah.

11 Let me -- to the exclusion of all other
12 entities in the world, in creation, when these tanks
13 are requalified, that is on Union Tank; correct?

14 A. It is Union Tank Car's financial
15 responsibility, but we do have qualification work
16 done in third-party certified repair shops. So --

17 Q. But not in this case?

18 A. No, not in this case. But I'm --

19 Q. So in this case involving this tanker,
03:09PM 20 those requalifications, both in 2004 and 2013, they
21 were exclusively Union Tank?

22 A. That is correct; yes, we did both
23 qualifications.

24 Q. And the person who did this input, this
25 intake form, who made this notation right out here

1 to the right-hand side (indicating) --

2 MR. FRIEDMAN: If we can bring that up.

3 BY MR. FRIEDMAN:

4 Q. -- that says "may be water"? That was a
5 Union Tank Car representative or employee; right?

6 A. Yes.

7 Q. Now, there were -- there was discussions
8 about How Codes or Why Codes.

9 A. Why Made Codes.

03:09PM 10 Q. Why Make Codes?

11 A. Yes.

12 Q. And that's w-h-y; right?

13 A. Yes.

14 Q. Make, m-a-k-e?

15 A. M-a-d-e.

16 Q. Oh, m-a-d-e.

17 So that's somebody on this form asking for
18 or responding to "Why did you make that notation?"
19 Right?

03:10PM 20 A. Uh-huh, uh-huh.

21 Q. Correct?

22 A. Yes, it is.

23 Q. And there is a code in this document here,
24 and you were asked about Why Made Codes; correct?
25 Right?

1 A. Generally speaking, yes.

2 Q. Yeah, you were asked on direct.

3 And this code for 01 for these bearing
4 adapters where they -- there is a reference that may
5 be subject to water, what does that 01 mean?

6 A. Repair and replace.

7 Q. I think it means -- and I'll show you if
8 you want to look, but I think it means they're worn
9 out.

03:10PM 10 A. Worn and subject to repair or replacement.

11 Q. Okay.

12 A. That was on the inbound inspection
13 document, once again.

14 Q. So we know one of two things. It was
15 either you say it was rusted by snow and rain.

16 A. Exposure to the elements.

17 Q. Exposure to the elements. Or submersion.

18 A. No evidence to that effect.

19 Q. Other than it was rusted and somebody wrote
03:11PM 20 water out there; right?

21 A. I'll agree to that, yes.

22 Q. And they also went so far as to say -- let
23 me -- let me not leave this hanging. I believe I
24 went to the trouble of getting that.

25 MR. FRIEDMAN: Gary, could you help me. I

1 believe that is -- the Why Made Code would
2 be -- Defendant's 111, I believe, is the exhibit.

3 Here it is right here (indicating).

4 I'm going to have to go on ELMO, if I may.

5 By the way, ELMO is the name of this
6 contraption.

7 MR. DAVIS: I have it. Wait a minute.

8 MR. FRIEDMAN: What are we going to do?

9 MR. DAVIS: I'm going to show it.

03:12PM 10 MR. FRIEDMAN: I'm sorry, Your Honor. I've
11 got this right here.

12 BY MR. FRIEDMAN:

13 Q. So, as background, Mr. Constantino -- go
14 ahead and get a drink of water. We've been here for
15 a little while, but --

16 Okay. So this Exhibit 111 is a part of
17 the -- of the field manual for interchange rules,
18 2013, and I'm reading from -- okay. All right. If
19 you recognize that page, page 288 of Exhibit 111.

03:13PM 20 Do you recognize that page, sir?

21 A. Yes.

22 Q. And does that have a definition of Why Made
23 Codes?

24 A. Yeah. Code 01, as highlighted here, is
25 equal to or defined as worn out. That was the code

1 used at inspection.

2 Q. So then can we agree that at the time the
3 tanker was taken in in 2004, there was a notation
4 made as to the bearing adapters that they may
5 be -- it says "may be water," and then the Why Made
6 Code indicates that the adapters were worn out,
7 according to your codes?

8 A. You know, could we call back up the UTC
9 document once again, the inspection document?

03:14PM 10 Q. Yes.

11 MR. DAVIS: Go back to here?

12 BY THE WITNESS:

13 A. Yes, the 01 code was used, and that implies
14 that they should be inspected for excessive wear.
15 Excessive wear has nothing to do with exposure to
16 the elements or rust.

17 BY MR. FRIEDMAN:

18 Q. Well, maybe it's just so worn out, it's
19 about to fall apart.

03:15PM 20 A. The -- the roller bearing adapter is a cast
21 piece of steel that's about six inches square. It's
22 not likely to wear out or rust out. It can break,
23 and that's cause for removal.

24 There are wear indications in the casting
25 itself that are subject to inspection to determine

1 finally whether or not the article is worn to the
2 point where it needs to be removed.

3 Q. Mr. Constantino, I didn't say it was worn
4 out. Union Tank said it was worn out, didn't they?

5 A. On the initial inspection --

6 Q. Yes.

7 A. -- document where it was not the conclusive
8 inspection; it was the initial visual inspection of
9 the car.

03:16PM 10 Q. I get that. And then there is an initial
11 right beside the 01; right? With a J.

12 A. Yes.

13 Q. And that identifies the person who was
14 doing the intake?

15 A. Correct.

16 Q. Correct?

17 A. Yes.

18 Q. All right. And did you do anything to
19 track down this individual?

03:16PM 20 A. I did not, no.

21 Q. So it has the bearing adapters for L1 and
22 L2; correct?

23 A. Yes.

24 Q. And then it has L3 and L4; correct?

25 A. Yes.

1 Q. And that -- that would be the bearing
2 adapter for the adapter over the roller bearing that
3 failed that is the subject of this lawsuit; correct?

4 A. It annotates the bearing adapters at all
5 four wheel positions on the car.

6 Q. Right.

7 A. Not just wheel four.

8 Q. And it would include, though, the bearing
9 adapter for the bearing that failed in this case?

03:17PM 10 A. Yes, sir.

11 Q. And then if we go to the next page of
12 Exhibit 144. This is dated March 4th of 2004.

13 A. Uh-huh.

14 Q. And if you look down in the middle of the
15 page -- now, I will say -- and this is not the same
16 document that was shown to you by counsel in your
17 direct examination because that document indicated,
18 I believe, that a third of an hour was spent looking
19 at the bearing adapters. Do you recall that
03:18PM 20 testimony?

21 A. No, not with respect to a third of an hour.

22 Q. Okay.

23 A. I said one hour.

24 Q. I may be wrong on the time. But this is
25 something different, I believe, that is represented

1 there. But you'll see the reference to "inspect
2 bearing adapters." Did I see that correctly?

3 A. Yes.

4 Q. Did I read that correctly?

5 A. It has a -- off on the far right-hand side,
6 it records that 1.1 hour was spent inspecting the
7 roller bearing adapters in this particular document.

8 Q. I'm going to ask you about the notation of
9 R&R. Does that stand for remove and replace?

03:18PM 10 A. Remove or renew are interchangeable terms.
11 But it is an inspection of the roller bearing
12 adapters looking for fit and wear patterns and
13 whether or not wear on that set of adapters is still
14 compliant with the rules.

15 Q. Can you tell us whether it was replaced or
16 not?

17 A. The absence of a material charge says that
18 the inspection performed at the particular work
19 station for those adapters proved out that the wear
03:19PM 20 was not excessive, that there was no other cause for
21 removal of those adapters, and they were returned to
22 service.

23 Q. Mr. Constantino, you don't know that.
24 You're surmising that; right?

25 A. We have trained inspectors who look at

1 these articles continuously who are trained to
2 identify and follow the rules.

3 Q. So you --

4 A. And they inspected --

5 Q. You're hoping someone there does their job,
6 and based on that, you're concluding what you
7 believe they did; right?

8 A. The system works across the board within
9 our repair locations, our training, our procedures
10 has --

03:20PM

11 Q. Mr. Constantino, did it work for the people
12 in Maryville, Tennessee? Did the system work for
13 them?

14 MR. FLEMING: Your Honor, objection,
15 argumentative.

16 MR. FRIEDMAN: He set the --

17 MR. FLEMING: And he's not -- he hasn't
18 allowed the witness to finish his answer.

19 THE COURT: It's probably somewhat
20 argumentative, but I'll overrule the objection.

03:20PM

21 BY MR. FRIEDMAN:

22 Q. Did the system work for people in
23 Maryville, Tennessee who were forced to evacuate
24 their homes?

25 A. On that day, no.

1 Q. Let's move on to Exhibit -- Rule 37 for
2 roller bearing adapters. The same document, page
3 278.

4 MR. FLEMING: What number is it?

5 MR. FRIEDMAN: 111.

6 BY MR. FRIEDMAN:

7 Q. Yes, sir. Have you seen this document
8 before, please, sir?

9 A. I know of Rule 37.

03:21PM 10 Q. There are requirements, are there not, for
11 the removal of roller bearing adapters; correct?

12 A. There are conditions that, when seen,
13 require the removal of roller bearing adapters, yes.

14 Q. Here is my question: Does Union Tank Car
15 when they replace roller bearing adapters, do they
16 replace the roller bearings at the same time?

17 A. No.

18 Q. Okay. So you can replace a worn roller
19 bearing adapter and leave the roller bearing there?

03:22PM 20 A. Those two items are completely separate.
21 They are -- they are not attached. They are
22 complementary to one another and part of a truck
23 system, but there is no dependency there. If you
24 replace one article, you must replace another
25 article.

1 Q. And that's a policy?

2 A. That is -- is the structure of the rules.

3 Q. You would agree with me, however, that a
4 roller bearing, a roller journal could not work
5 without a properly-functioning roller bearing
6 adapter?

7 A. You would have a noncompliant truck set,
8 yes.

9 Q. Now, let me go, if I may -- and I'm going
03:23PM 10 to take this out of order.

11 MR. FLEMING: What exhibit is it?

12 MR. FRIEDMAN: I'm going to show you. I'll
13 show you. It's Exhibit 12. I'll give you our
14 number. I think it's our 24.

15 BY MR. FRIEDMAN:

16 Q. Let me show you Exhibit 24, and I do not
17 believe there is any objection to it.

18 MR. FLEMING: What number?

19 MR. FRIEDMAN: 24. Plaintiffs' 24. It was
03:23PM 20 Deposition Exhibit 12 to Mr. Constantino.

21 MR. FLEMING: Well, there is no objection
22 list. So --

23 MR. FRIEDMAN: Excuse me?

24 MR. FLEMING: No, we did not -- we didn't
25 list an objection, Your Honor.

1 THE COURT: I'm sorry. There is no
2 objection?

3 MR. FLEMING: There is a relevance
4 objection to the fact that it was issued August 28th
5 of 2017, but we did not lodge an objection on the
6 exhibit list.

7 I would argue that it is irrelevant given
8 that it postdates the accident several years or two
9 years after the accident. It has absolutely no
10 relevance.

03:24PM

11 MR. FRIEDMAN: I'll lay the predicate for
12 it, Your Honor.

13 THE COURT: Go ahead. We'll see. And then
14 we'll allow -- we'll hear an objection if there
15 still is one.

16 (Plaintiffs' Exhibit 24 was marked
17 for identification.)

18 BY MR. FRIEDMAN:

19 Q. So you produced a memo dated August 28th of
20 2017 concerning storm-damaged cars at your
21 deposition. Do you remember that?

03:24PM

22 A. Yes, sir.

23 Q. You were asked about it.

24 A. Uh-huh.

25 Q. And it talked about financial responsibility

1 for flood damage is similar to railroad damage. If
2 a car is on railroad property, the railroad is
3 responsible. Cars that are on customer property,
4 customer-leased storage sites or their customer
5 sites are the responsibility of the lessee.

6 A. Uh-huh.

7 Q. Is that consistent with your recollection?

8 A. Yes.

9 Q. Now, that -- how long has that policy been
03:25PM 10 in place?

11 A. For my entire career.

12 Q. Okay. So the fact that this is just reduced
13 to writing in August of 2017 is beside the fact that
14 the policy was there in one form or another for --
15 going way back before 1994?

16 A. I would agree with that, yes, sir.

17 Q. Going all the way back before 2004.

18 MR. FRIEDMAN: So we'd offer Plaintiffs'
19 24.

03:25PM 20 MR. FLEMING: Again, the fact that the
21 policy exists doesn't do anything to make this
22 document that was issued two years after the
23 accident relate to anything to do with this
24 particular tank car, Your Honor.

25 THE COURT: Well, it's probably -- I mean,

1 we've got the testimony. Why don't we -- I don't
2 think we need the document. So I'll sustain the
3 objection as to the introduction of the document but
4 keep in place the testimony related to the policy in
5 effect at the time.

6 BY MR. FRIEDMAN:

7 Q. Is it -- was the policy in effect in 2004
8 also the same with respect to whenever water levels
9 reached the bottom of the jacket, which would be the
03:26PM 10 bottom of the insulation on a tank car, the car will
11 need to be shopped, inspected, replace damaged
12 insulation, clean out bottom outlet valves. The
13 faster this work gets done, the better, as corrosion
14 will begin and continue to spread?

15 A. If the water level would have gotten to the
16 bottom of the jacket of any car, it would have
17 exceeded the height of the bearings and the bearings
18 would have required change-out before the car moved
19 to shop.

03:27PM 20 Q. Now, if we go to Exhibit 111 or back to
21 Exhibit 111. Excuse me. This is Plaintiffs'
22 Exhibit 144. And you've been asked about this
23 already.

24 This time the -- previously I asked you
25 about the roller bearing adapter. Now I'm talking

1 about -- I'm going to ask you some questions to
2 follow up on the tank itself, and I believe you were
3 asked a question and you were asked about a specific
4 work order number. Let me just go back to that. Do
5 you see that in front of you, Mr. Constantino?

6 A. I do, yes, sir.

7 Q. And this is an inbound inspection, wet
8 insulation, drill drain holes per project letter.

9 A. Correct.

03:27PM 10 Q. Okay. Now, as I understand your testimony
11 about the project, this -- from what I've heard,
12 there was a project to deal with wet install- --
13 insulation around the bottom of the tanker cars;
14 right?

15 A. It was a project established to install
16 drain holes so that moisture that had been sucked in
17 to the jacket space after gravity had taken it and
18 put it at the bottom of the car so that water could
19 leave.

03:28PM 20 Q. Right. And so you drain -- those holes
21 were drained so the water could be drained out?

22 A. Yes.

23 Q. And then the insulation was replaced? I'll
24 show you on the next --

25 A. No, no, no. The -- this project requires

1 the drilling of three holes that are three-quarters
2 of an inch in diameter.

3 Q. Okay.

4 A. There is no insulation of substance that is
5 displaced by that activity.

6 Q. All right. Well, good, because the -- the
7 project letter order number was 60202.

8 A. That's correct.

9 Q. Now, I have a doc- -- another document in
03:29PM 10 front of you, that I'm going to put in front of you,
11 from the same exhibit.

12 This is -- okay. Well, I'm just going to
13 read it. This is a different order; okay? Just for
14 the record, it's not 60202, it's 60235. Did I read
15 that correctly?

16 A. Yes, you did.

17 Q. Do you see that?

18 And this talks about replacing new
19 insulation. So that's a separate project.

03:30PM 20 A. For somebody on the outside, it would be
21 very easy to jump to all sorts of speculation, but
22 let me explain to you exactly what's going on here.

23 Q. Okay.

24 A. In the order space, once again -- hopefully
25 I didn't wipe it out. I just highlighted it. But

1 it's 60235. That was an internal tracking project
2 for qualifications. And as you'll see, the first
3 line of this particular work order is
4 qualifications.

5 Now, as part of the structural integrity
6 testing that I was talking about earlier, we're
7 required to remove areas of the jacket to look at
8 certain welded attachments to the tank. And the
9 only way to do that is to remove the jacket and
03:31PM 10 remove insulation and do a specific inspection of
11 the weld.

12 And what you see on this page completely is
13 remove and replace jacket, remove and replace
14 insulation, all of which are part of the process of
15 doing a qualification. And the areas that are
16 looked at are small in comparison to the total size
17 of the car.

18 Q. All right. Mr. Constantino, thank you for
19 explaining that.

03:31PM 20 Can we agree that water, whether it's
21 trapped in the insulation in the tanker or whether
22 it infiltrates an adapter or roller bearing, that
23 could cause deterioration of the product, couldn't
24 it?

25 A. Deterioration of a product. Would you

1 afford me an explanation of what that means.

2 Q. Yeah, I'll use the -- I'll use your own
3 language to do it.

4 If water levels reach the bottom of the
5 jacket on a tank car, the tank -- the car will need
6 to be shopped to inspect, replace damaged
7 insulation, clean out the bottom valves. The faster
8 this work gets done, the better, as corrosion will
9 begin and continue to spread.

03:32PM 10 A. Yes. The first point of reference, as I
11 said earlier, this is a pressure car, and there is
12 no bottom outlet valve on this car. So that was a
13 reference in the generic to the fleet at large.
14 That has no particular bearing to this car because
15 it doesn't have a bottom outlet, though.

16 Q. Well, it has a bottom of the car -- the
17 bottom of the tanker, and if you had water trapped
18 up against it, it creates corrosion; correct?

19 A. This particular car has a coating to the
03:33PM 20 tank itself prior to the application of insulation,
21 and both occasions where the car was qualified,
22 there was no indication of corrosion to the tank
23 based on our sonic inspection thickness readings
24 that were taken.

25 Q. All right.

1 A. Nor was there any corrosion evidenced to
2 the jacket itself.

3 Q. I don't think you answered my question. My
4 question is: You need to remove the water to
5 prevent corrosion. I didn't ask you if there was
6 corrosion. I meant as a -- as a threshold issue,
7 water is bad for a tanker. You need to move it to
8 prevent corrosion; correct?

9 A. And I agree with that, and that is why back
03:33PM 10 in 1996, we established the project internally to
11 put the drain holes in a car; not this car, every
12 car when we saw it.

13 Q. Mr. Constantino, before we move on from
14 that work that was done in 2004, I want to make sure
15 we have this and it's clear on the record.

16 Once work is done on a tanker, specifically
17 this tanker, the work that was done, the conditions
18 that were observed becomes part of the work file and
19 the history of the tanker for other Union Tank
03:34PM 20 employees or railroad employees to see and access;
21 correct?

22 A. No, I disagree with that.

23 Q. Union Tank keeps a complete record on its
24 tankers; correct?

25 A. That I agree with.

1 Q. And when that tanker is brought back in in
2 2013 for recertification, the information concerning
3 all the repairs of that -- that tanker are available
4 for review; correct?

5 A. If somebody had requested the prior
6 records, yes. One repair shop would have been able
7 to give it to another, yes.

8 Q. Let me change gears just a minute.

9 Is it your testimony that you found out
03:35PM 10 about this derailment from watching television?

11 A. No. I think the first indication that I
12 got was from the Internet. I do routinely go out
13 and look to see whether or not there are any events
14 ongoing that I should be aware of.

15 Q. Okay. And as a matter of fact, you found
16 out about the derailment not long after it happened?

17 A. It was the same day, yes.

18 Q. Same day. The same day. This is kind
19 of -- we're on the -- we're right before midnight.

03:36PM 20 So did you find out before midnight or after?

21 A. It was the following morning. But --

22 Q. Okay.

23 A. -- you know, the -- the event was still
24 ongoing.

25 Q. And on behalf of Union Tank, you were given

1 certain responsibilities in regards to the
2 derailment, weren't you?

3 A. I have an obligation to communicate
4 throughout the organization when such events occur.

5 Q. Sure. And you informed your superiors of
6 the derailment and the fact that a Union Tank Car
7 tanker was involved; right?

8 A. When it was ultimately determined that it
9 was a UTLX tank car involved, yes, I did communicate
10 that up to the chain of command.

03:37PM 11 Q. As well as to engineers?

12 A. Joe Perez was aware of the event before we
13 were informed that it was our car. So we were
14 already clued in to the need to pay attention and
15 cooperate if we were asked to produce any
16 information.

17 Q. Now, speaking of Mr. Perez, he -- I don't
18 know -- his video was playing earlier this morning.
19 I don't know if you were here for that. But

03:37PM 20 Mr. Perez, when his deposition was taken, he
21 testified on behalf of Union Tank Car and was their
22 spokesperson like you are here today in the trial;
23 is that your understanding?

24 A. His deposition was taken on that basis,
25 yes.

1 Q. Yeah. And you've seen his deposition or
2 read it?

3 A. I have read his deposition, yes.

4 Q. And the other responsibility that you had
5 after learning of the derailment, you were tasked
6 with securing all data and information relating to
7 the tanker?

8 A. Yes. I communicated, put out a directive
9 to those folks that would have controlled paper or
03:38PM 10 electronic files, and once the identity of the car
11 was known, instructed them to secure those records.

12 Q. Mr. Constantino, the information that's
13 been produced in this case about the work done on
14 the tanker in 2004, has that been produced to anyone
15 else, to your knowledge?

16 MR. FLEMING: Your Honor, I'm going to
17 object to the question. Again, we're talking about
18 a discovery issue, and now this question really
19 doesn't even make sense as to who else it would have
03:39PM 20 been produced to other than the plaintiffs and the
21 parties.

22 THE COURT: Are you talking about from a
23 discovery standpoint?

24 MR. FRIEDMAN: No, Your Honor, I'm talking
25 about authorities. I'm talking about his first

1 responsibility was to gather all the relevant
2 information.

3 THE COURT: So, with that --

4 MR. FLEMING: I'll withdraw.

5 THE COURT: You'll withdraw your objection.
6 Go ahead.

7 BY MR. FRIEDMAN:

8 Q. I'm not talking about the legal process
9 that we're hearing today. I'm talking about the
10 course of the investigation.

03:39PM

11 Were the repair records concerning what was
12 done to this tanker in 2004, were those produced to
13 anyone besides the context of this lawsuit?

14 A. We were asked to produce mechanical data,
15 design data and maintenance history on the car and
16 did provide that to FRA, yes.

17 Q. This is my question: Can you tell us here
18 under oath that those 2004 records that we just went
19 over were ever produced to FRA?

03:40PM

20 A. I have not seen a transmittal document. I
21 believe that they were part of the repair package,
22 but I was not there when the records were conveyed.

23 Q. In addition to Mr. Perez's deposition, you
24 also had the opportunity and I believe you did read
25 Craig Norris' deposition.

1 A. Yes, sir.

2 Q. He is the representative who testified in
3 this case on behalf of Brenco® and their parent
4 company, Amsted Rail, I believe --

5 A. Yes, sir.

6 Q. -- correct?

7 And he testified that as a courtesy to
8 Union Tank Car Company, he would have come and
9 inspected the mate bearing and looked at the grease
03:41PM 10 and done an evaluation. Do you remember seeing his
11 testimony on that?

12 A. Yes.

13 Q. He was never asked to do that, was he?

14 A. No, not -- not to my knowledge.

15 Q. And as far as the questions you were asked
16 about how this incident occurred or what led to the
17 roller bearing failure, Union Tank Car never did any
18 independent analysis to come to a conclusion, did
19 they?

03:41PM 20 A. We did not have an independent investigation,
21 no.

22 Q. And when Mr. Perez said in his deposition
23 over and over that Union Tank Car had reached no
24 conclusion as to what caused this bearing to fail or
25 how it failed, that is the sum total of what Union

1 Tank Car has concluded independently; right?

2 A. The -- we left that investigation of the
3 failure of that particular bearing up to the FRA
4 during the course of their overall investigation of
5 the incident.

6 Q. Well, I'm glad you brought that up.

7 You were asked questions about the FRA's
8 report and what they came up with, and I believe
9 your lawyer even asked you whether Union Tank was
10 fined. Do you remember that?

03:43PM

11 A. Yes, sir.

12 Q. They did come up with some recommendations,
13 though, didn't they, the FRA?

14 This is consistent with the Court's ruling.
15 I'm going to ask you this. I'm not going to put it
16 up.

17 THE COURT: Before you do that, it might be
18 a good time for an afternoon break anyway.

19 MR. FRIEDMAN: Thank you, Your Honor.

03:43PM

20 THE COURT: All right. We'll go ahead and
21 take a break. We'll let the jury take a break at
22 this time.

23 (Jurors excused from the courtroom.)

24 THE COURTROOM DEPUTY: This honorable court
25 should stand in recess until 4 o'clock.

1 (A brief recess was taken.)

2 THE COURTROOM DEPUTY: Please remain seated
3 and come to order.

4 THE COURT: Thank you. Everyone may be
5 seated.

6 You may continue.

7 MR. FRIEDMAN: If it please the Court, Your
8 Honor.

9 Madam Courtroom Deputy, would you -- could
04:11PM 10 you pull up for the witness's view only an exhibit
11 that's been marked for identification purposes as
12 140.

13 THE COURTROOM DEPUTY: 140?

14 MR. FRIEDMAN: Yes. Which is the Office of
15 Railroad Safety Summary Report. And if you could,
16 please, go to page 12 of that, the last page.

17 (Defendant's Exhibit 140 was
18 marked for identification.)

19 BY MR. FLEMING:

04:11PM 20 Q. Mr. Constantino, before we left for the
21 afternoon break, I was asking you some questions
22 about the Office of Railroad Safety Summary Report,
23 and I realize you didn't have that in front of you,
24 and I apologize for that, sir.

25 I want to ask you a background question or

1 two. Do you know from your personal knowledge
2 whether the FRA did a bearing failure analysis as
3 part of its investigation?

4 A. Which bearing?

5 Q. The mate bearing.

6 A. I do not believe FRA by themselves did such
7 an inspection.

8 Q. Now, with respect to -- I may have referred
9 to the bullet points on the last page as

04:12PM 10 recommendations, and if I did, I misspoke. There is
11 a section under Probable Cause that says FRA
12 Actions. Do you have that in front of you, sir?

13 A. Yes. And I appreciate that. It's just
14 been expanded so I can read it. Thank you.

15 Q. And it -- right before the bullet points,
16 it says, "Specifically, the investigative guidance
17 requires investigators to:" And then if you go down
18 to the fourth bullet point from the bottom, it says,
19 "Determine from the car history if the car was

04:13PM 20 involved with a flood or stored in a rainy or wet
21 environment." Did I read that correctly?

22 A. Yes, but I -- I believe it would be
23 important to appreciate the lead-in paragraph to
24 that which explains the FRA actions.

25 FRA is providing specific guidance in order

1 to provide consistent information and to collect
2 trending data for analysis, and it's instructing its
3 people in the field to pay specific attention to
4 certain items that should be data that should be
5 acquired during the course of any investigation.
6 That's -- that's what this paragraph is addressing.

7 Q. And it also -- I didn't mean to cut you
8 off. Were you through, sir? Had you finished your
9 answer?

04:14PM 10 A. Yes, sir.

11 Q. And one of the recommendations that was
12 made to people in the field was to take note of the
13 bearings for -- the adapters for the bearings. Do
14 you see that? The second bullet point.

15 A. Inspect the bearing adapters for manufacturer
16 installation flaws, yes.

17 Q. Now, while we're on this, and I'll do this
18 in the -- in the sake of trying to expedite things.

19 There has been -- you testified about CSX
04:15PM 20 settling up with Union Tank for the cost of the
21 tanker. Do you remember that testimony?

22 A. For the depreciated value under Rule 107 of
23 the interchange rules, yes, sir.

24 Q. And those interchange rules don't have
25 anything to do with liability in a court of law, do

1 they?

2 A. No, they don't.

3 Q. As a matter of fact, the document that you
4 have in front of you, the FRA that you've been asked
5 about, they found that the operating crew was
6 qualified, rested and fit for duty. Did I read that
7 correctly?

8 A. Yes.

9 Q. That's on page 9?

04:15PM 10 A. Yes.

11 Q. "There was no evidence that the
12 qualifications or actions taken by the operating
13 crew caused or contributed to the accident." Did I
14 read that correctly?

15 A. Yes.

16 Q. As a matter of fact, in your deposition
17 that was taken, I believe, and you correct me if I'm
18 wrong, but you said the actions of the CSX crew were
19 exemplary. Do you remember your testimony in that
04:16PM 20 regard?

21 A. No, my words on memory were that at that
22 point in time when the crew unquestionably
23 recognized they had a compromised consist that they
24 were able to bring the train to a controlled stop,
25 and I thought that was commendable of them the way

1 they operated.

2 Q. At page 126 of your deposition, so I'm not
3 at risk of misquoting it, there is your answer: (As
4 read)

5 "I think the crew in this case is to be
6 commended because at that point in time
7 they were unequivocally identified -- that
8 they -- where they unequivocally identified
9 they had a compromised train consist, they
04:17PM 10 acted in a professional manner to bring
11 that train to a controlled stop without any
12 further upset. And that is -- I think that
13 is to be complemented."

14 A. Yes. Those are my exact words.

15 Q. And that's why --

16 A. My answer to your question is closer to
17 that than what you attributed to me, yes.

18 Q. Well, either way, you didn't find fault
19 with the -- with the CSX crew in your deposition,
04:17PM 20 and it's not coincidence, is it, that the Office of
21 Railroad Safety doesn't find fault with them either,
22 did it -- does it?

23 A. No, I don't find that unusual.

24 Q. If I may, I'd like to change gears just a
25 minute.

1 You were asked earlier about certain
2 regulations. Specifically, you were asked about 49
3 C.F.R. 215.115 or 1-1-5. Do you remember that?

4 A. Yes.

5 Q. C.F.R. is Code of Federal Regulations;
6 right?

7 A. Correct.

8 Q. And there are just whole volumes of
9 regulations. Have you ever taken the time to go
04:18PM 10 through them all? You don't have to answer that
11 question. They're voluminous, though; correct?

12 A. Yes, they are.

13 Q. All right. I want to limit my question to
14 the pertinent C.F.R. that you were asked about by
15 the lawyers for Union Tank on direct.

16 Specifically, you were asked about 49
17 C.F.R. 215.115, and you were asked whether or not a
18 railroad can place or continue a car in service that
19 had a roller bearing that showed signs of having
04:19PM 20 been overheated as evidenced by, and then there is a
21 couple things there.

22 Do you see discoloration or other telltale
23 signs of overheating, such as damage to the seal or
24 distortion of any bearing component?

25 A. Yes.

1 Q. Do you follow that?

2 A. Yes.

3 Q. There is also a kind of catchall if you go
4 down to item three of that code section, and it
5 says --

6 MR. FRIEDMAN: Excuse me?

7 MR. FLEMING: Go ahead.

8 BY MR. FRIEDMAN:

9 Q. -- (as read) "Each defective roller bearing
04:19PM 10 shall be repaired or" -- "shall be repaired or
11 replaced before the car is placed back into
12 service." Did I read that correctly?

13 MR. FLEMING: Your Honor, I object to this
14 line of questioning. Your Honor has already
15 identified this section as one that applies to the
16 issues that exist against my client with respect to
17 the 2013 qualification, and the interpretation by
18 plaintiffs' counsel of paragraph 3 to be a catchall
19 has not been determined as a matter of law and is
04:20PM 20 not set forth in this section of the Code of Federal
21 Regulations at all. I think that's for the Court to
22 determine, not for him to advise the jury of.

23 MR. FRIEDMAN: Your Honor, I will be happy
24 to rephrase that.

25 THE COURT: All right. Go ahead and

1 rephrase it and see if you can meet the objection.

2 BY MR. FRIEDMAN:

3 Q. This is the point I'm trying to make: You
4 were asked about, I believe, Section 1 and Section 2
5 in your direct examination. There is a third
6 section that -- is there not, and that reads, "Each
7 defective roller bearing shall be repaired or
8 replaced before the car is placed back in service."
9 Did I read that correctly?

04:21PM 10 A. You did read it correctly.

11 Q. And this pertains, does it not, to
12 requalification?

13 A. No, it pertains to Rule 36.

14 Q. Okay. Which is --

15 A. Which is the inspection of roller bearings,
16 which is part of qualification.

17 Q. So I may have gotten the nuance of it
18 wrong, but the substance of it is: This pertains to
19 the requalification process and the examination of
04:21PM 20 bearings, doesn't it?

21 A. It is related to. It is independent,
22 however, because at any point in time where a
23 bearing is determined to be defective, it must be
24 removed and replaced.

25 It is not dependent on there being an

1 ongoing qualification of that car concurrent to the
2 determination of a defective bearing being on the
3 car.

4 Q. I get what you're saying. No one should
5 ever put a tanker car on a track with a defective
6 bearing; right? We can agree on that.

7 A. Such a car with a bearing determined to be
8 defective should not be returned to interchange
9 service. The car is going to be on the track.

04:22PM 10 Q. Now, I take from your testimony that it
11 applied -- this rule applies to everyone, not just
12 the owner of the tanker; right?

13 A. That's correct.

14 Q. But the owner of the tanker, in this case,
15 Union Tank Car Company, is the only company that
16 performed a requalification; right?

17 A. Qualification, yes. We performed
18 qualification inspections on the car twice.

19 Q. I put -- I mistakenly called it a
04:23PM 20 requalification. It's a qualification.

21 A. Yes, sir, that's correct.

22 Q. And that qualification, that's something
23 that is very detailed, isn't it?

24 A. Yes.

25 Q. For example, the qualification process that

1 took place in 2014 and as well as 2004, they took
2 weeks to perform, didn't they?

3 A. The average cycle time for a car going
4 through our repair facility is between 45 and
5 60 days. That's not unusual.

6 Q. That's just not somebody walking by a --
7 walking by a tanker car pointing a flashlight at the
8 wheels and bearings, is it?

9 A. No.

04:23PM 10 Q. It's much more complex?

11 A. That's correct.

12 Q. And when -- and the idea and the goal when
13 that tanker rolls out of there, in this case, when
14 it came out of the shop in Texas, you all put a
15 stencil on it. You painted a stencil on the end of
16 the car; correct?

17 A. There are many stencils on the car that
18 must be maintained, yes, sir.

19 Q. Sure. But at the end of it, at the end of
04:24PM 20 the 2013 re- -- excuse me -- qualification, not
21 requalification. At the end of the 2013
22 qualification, that six-week process, or however
23 long it was, you -- Union Tank Car Company painted a
24 stencil on the side of the tanker telling the world
25 that the car had been qualified; correct?

1 A. Yes. The rules under 49 C.F.R. 180 do call
2 for the railcar to be marked in such a way to
3 identify where and when and what items were attended
4 to during qualification inspections.

5 Q. And it also puts as part of what's painted
6 on the tanker the date for the next qualification,
7 and that date was 2023; correct?

8 A. That's correct.

9 Q. Did I understand your testimony earlier in
04:25PM 10 response to counsel's questions that Union Tank Car
11 is not allowed to take off a roller bearing and open
12 it to inspect it?

13 A. The bearings are sealed and mounted. If
14 there is any evidence of that seal being
15 compromised, that bearing must be removed from
16 service.

17 And I also said that Union Tank was not a
18 certified re-conditioner of bearings. So, yes, we
19 do not rebuild bearings ourselves.

04:26PM 20 Q. Well, what I'm -- what I'm questioning is:
21 Going back to this code section, this -- this C.F.R.
22 that you were asked about by your attorney, on the
23 second page under 2, it calls for or directs the
24 roller bearing shall be disassembled from the axle
25 and inspected internally if -- and then it has --

1 one, two, three, four -- four different conditions
2 there; is that correct?

3 A. Yes.

4 Q. But this -- and correct me if I'm wrong,
5 but this talks about inspecting the roller journal
6 internally. Do you read -- is that how you read
7 that?

8 A. What it says is that the roller bearing
9 itself must be disassembled and removed from the
04:27PM 10 axle. Those roller bearings are press-fit onto the
11 axle journal, and you need special tooling and a lot
12 of effort to remove the roller bearing from the axle
13 itself.

14 Then it does say that in the presence of
15 certain conditions the bearing itself is to be
16 inspected internally.

17 Q. Is it your testimony that y'all aren't
18 qualified at Union Tank to inspect a roller bearing
19 internally or it's something you just don't do?

04:28PM 20 A. We don't do it. The bearing, if any of the
21 conditions are seen or heard, pursuant to Rule 36,
22 it's considered failed and we take that wheel set
23 with those bearings and move them to a certified
24 location who could do that reconditioning.

25 Q. So you would get another company to come in

1 and do the internal inspection that's referenced in
2 the C.F.R. here?

3 A. In effect, we are putting that wheel set to
4 a re-conditioner for them to rebuild the bearing and
5 re-profile the wheel if, in fact, it requires it.

6 Q. There are other standards that apply, such
7 as 49 C.F.R. 171.7. Are you familiar with the
8 Hazardous Materials Transportation Act?

9 A. Yes, I am.

04:29PM 10 Q. I'm going to pull that up and ask you a
11 question about it. It's 179.7, Quality Assurance
12 Program.

13 A. Uh-huh.

14 Q. "At a minimum, each tank car facility shall
15 have a quality assurance program approved by AAR
16 that" -- and if you go down -- one. It says,
17 "Ensures the finished product conforms to the
18 requirements of the applicable specification and
19 regulations of this subchapter." And, two, "Has the
04:30PM 20 means to detect any nonconformity in the
21 manufacturing, repair, inspection, testing, and
22 qualifications or maintenance program of the tank
23 car." Did I read that correctly?

24 A. Yes.

25 Q. And if -- if that requirement calls for you

1 to remove and inspect the interior or open up a
2 roller bearing, is it your testimony that your shop
3 isn't qualified to do that?

4 A. No, we cause that bearing to be removed
5 from service and put it in the hands of a certified
6 re-conditioner.

7 Q. I know you testified that your repair shops
8 are subject to audits, but has that shop in Texas
9 ever been audited?

04:31PM 10 A. Yes. I don't off the top of my head know
11 the last date that they were visited by FRA or AAR
12 officials, but I know it's occurred.

13 Q. All right. I'm going to ask you to search
14 your mind -- your memory on this because we have not
15 found any audits for the Texas shop. Are you
16 certain they exist?

17 A. I am certain that FRA officials have been
18 on the premises and have reviewed the processes with
19 the people at that shop, which, from my perspective,
04:31PM 20 is an FRA audit.

21 I'm not so sure that FRA writes or
22 publishes an internal document, like an annual
23 report. But I do know and have -- I do know that
24 FRA has been at that facility and their processes
25 have undergone FRA overview.

1 Q. Let me end this line of questioning this
2 way: Would you agree with me that you have never
3 seen a formal audit from the FRA for that Texas
4 repair location where the 2014 qualification took
5 place?

6 A. That I would agree with, yes. I've not
7 seen a document should it exist.

8 (Plaintiffs' Exhibit 104 was
9 marked/received into evidence.)

04:32PM 10 MR. FRIEDMAN: Plaintiffs' Exhibit 104.
11 There has been no objection to it. I believe it's
12 already in evidence.

13 BY MR. FRIEDMAN:

14 Q. You were asked earlier today -- I know it
15 seems like a long time ago -- about a -- about a
16 bearing specification. I believe it's
17 Exhibit -- yeah, Defendant's Exhibit 148.

18 Do you remember about the -- about the
19 questions you were asked about the standard for
04:33PM 20 roller journal bearings, Defendant's 148? Do you
21 remember that line of questioning that you were
22 asked?

23 A. Yes.

24 Q. There is a separate standard, is there not,
25 Specification M-943, for --

1 MR. DAVIS: 942.

2 MR. FRIEDMAN: Yeah. I'm sorry. It's
3 M-942.

4 BY MR. FRIEDMAN:

5 Q. And that is a standard for journal roller
6 bearing grease. Do you see that?

7 A. Yes.

8 Q. And it was adopted in 1975 and revised on
9 several occasions. The latest one on this exhibit
04:34PM 10 would have been -- or it is listed as March 6, 1992.
11 Do you see that, sir?

12 A. I see it, yes.

13 Q. And that would have been the applicable
14 standard for the grease that was put in the Brenco®
15 bearing that was attached and made part of the Union
16 tank car that's the subject of this case --

17 A. Yes, sir.

18 Q. -- correct?

19 And you were asked about this, I believe,
04:34PM 20 in your deposition, and I believe you --

21 THE COURT: Let me just clarify. The
22 exhibit we're showing now, is that Exhibit 148 or is
23 that --

24 MR. FRIEDMAN: I'm sorry, Your Honor. For
25 the record, this is Exhibit 104.

1 THE COURT: Plaintiffs' 104?

2 MR. FRIEDMAN: Plaintiffs' 104.

3 THE COURT: To which there is no objection?

4 MR. FRIEDMAN: To which there is no
5 objection.

6 THE COURT: Okay. Thank you.

7 BY MR. FRIEDMAN:

8 Q. And Plaintiffs' Exhibit 104, you were --
9 you've been asked about this in your deposition. I
04:34PM 10 believe you testified about it, but I would like to
11 take a moment to ask you a question.

12 With respect to the previous exhibit, the
13 one that is the -- that relies -- that pertains to
14 roller journal bearings, you pointed out in response
15 to a question that that -- that those roller journal
16 bearings had a life, according to that document, of
17 500,000 miles. Do you remember that?

18 A. A minimum of 500,000.

19 Q. Minimum life.

04:35PM 20 Is there in this standard for journal
21 roller bearing grease a 500,000-mile standard?

22 A. Well, this is multiple pages, and I
23 can -- quite honestly, I can barely read the script.
24 If it could be enlarged, I could --

25 Q. We'll do that. We'll do that.

1 While he's enlarging the script, the
2 specification itself is four pages, and then it's
3 followed by a couple appendices.

4 So let's start with the -- let's start with
5 the standard. Let's start with the Scope. Do you
6 see anything there about 500,000 miles?

7 A. No, sir.

8 Q. And then Thickness, Oils and Inhibitors.
9 Anything there?

04:36PM

10 A. No.

11 Q. And then let's go to page 2, Oxidation
12 Inhibitor, Rust Inhibitors and Grease.

13 A. There is no mileage statement in that
14 clause.

15 Q. So does that take us all the way through
16 the second page?

17 A. Yes.

18 Q. And let's look at the third page.

04:37PM

19 A. Could you afford me just to go back one
20 page and let's look at the bottom paragraph.

21 Q. Yes, sir.

22 A. Okay. This particular clause outlines that
23 a sample of any grease attempting to achieve AAR
24 certification that needs to be supplied for an
25 eight-week test and then put into service trial.

1 But it does not state a lifetime mileage limitation
2 in that clause.

3 Q. And then we'll go to the third page. Is
4 there a reference to 500,000 miles on page 3 or 4?

5 A. No, sir.

6 Q. And the Appendix, I believe, that you were
7 referring to is on -- is Appendix D?

8 A. Uh-huh.

9 Q. And it's on page 8-169 of the exhibit. Is
04:38PM 10 this the eight-week simulated service test for
11 qualifying roller bearing grease that --

12 A. That was quality control. Uh-huh. That's
13 what I was referring to earlier.

14 Q. Any reference to 500,000 miles in Appendix
15 D?

16 A. No. The principal fact is that the
17 lubrication standard embedded within the journal --
18 roller bearing journal approval is in sync with the
19 minimum service expectation for the bearing itself.

04:39PM 20 It does say within that standard that the
21 lubrication is -- must be such in order to provide
22 for the generally problem-free operation of the
23 bearing to the minimum life expectancy in the
24 standard.

25 Q. And Appendix D references 49,000 miles for

1 the test, doesn't it?

2 A. For the -- for the service trial test.

3 Q. Right.

4 A. That's not what I was speaking of.

5 Q. Okay. But there is no reference, and we
6 can agree, to 500,000 miles minimum life, is there,
7 for the grease?

8 A. On the grease, that's correct. Other than,
9 as I said, the attribution that lubrication, which
04:40PM 10 is grease, must be such that it allows the bearing
11 to continue to perform problem-free for the minimum
12 life expectation in the bearing standard.

13 Q. No mileage given, is there?

14 A. On the grease standards?

15 Q. Yes.

16 A. Correct. On the bearing standard.

17 Q. Yes, the bearing standard, we've covered
18 that. We're heard that. We're talking about the
19 grease standard now.

04:41PM 20 A. And I'm saying that lubrication is the
21 equivalent to grease, and lubrication is articulated
22 in the bearing standard, and the bearing standard
23 says 500,000 miles.

24 Q. But it doesn't show up in the grease
25 standard, the lubrication standard you just read.

1 A. I've agreed to that, yes.

2 Q. Now, I believe you've testified earlier,
3 and I want to follow up with this. I know we're
4 getting late in the day, but -- but you've testified
5 that Union Tank Company did not have any indication
6 that there was a minimum or maximum life for grease
7 that was being put in the roller bearings being put
8 on its tank cars?

9 A. What I have said is that there is no fixed
04:42PM 10 life associated with the bearings themselves.

11 Q. All right. But what about the grease?
12 There is with the grease, and y'all are on notice of
13 it, aren't you?

14 A. If we're talking about the marketing
15 materials used by Brenco® in their bearings, I've
16 seen those documents.

17 (Plaintiffs' Exhibit 15 was
18 marked/received into evidence.)

19 BY MR. FRIEDMAN:

04:42PM 20 Q. Right. For example, on Plaintiffs' Exhibit
21 15 --

22 MR. DAVIS: It's been admitted.

23 MR. FRIEDMAN: Excuse me?

24 MR. DAVIS: It's been admitted.

25 MR. FRIEDMAN: It is.

1 BY MR. FRIEDMAN:

2 Q. If you look at page 11 of Exhibit 15. So
3 Amsted Rail provides information concerning the
4 products that you buy from them and put on your
5 tankers, doesn't it?

6 A. As I said, marketing materials, yes.

7 Q. And they specifically deal with
8 lubrication, don't they?

9 A. They talk to lubrication. The marketing
04:43PM 10 materials, the Brenco® brochure is not the AAR
11 standard.

12 Q. Okay. Let's get into that a little bit.
13 This is a representation from Amsted Rail,
14 the maker of Brenco® bearings, to the people that
15 buy their products, and that would include Union
16 Tank Car, and if you look at page 11, which we're
17 going to turn to --

18 A. No, no, let's -- let's first look at page
19 1.

04:44PM 20 Q. Well --

21 A. And --

22 Q. Excuse me, sir. This is my job is to
23 conduct this examination. So --

24 A. I apologize.

25 Q. If you will go to page 11 and look at

1 Lubrication.

2 Now, it references Brenco® AAR class
3 bearings which are the bearings that we're talking
4 about in this case. They are -- they are non-field
5 lubricated bear- -- sealed or tapered bearings;
6 correct?

7 A. That's correct, yes, sir.

8 Q. "The Brenco® bearing is designed with a
9 seal that with proper handling and care will run for
04:44PM 10 years without any substantial grease loss." Did I
11 read that correctly?

12 A. Yes, sir.

13 Q. Then the next sentence, "Therefore, the
14 bearing is not to be lubricated while in service.
15 While grease life can vary with different service
16 conditions such as load, speed, temperature, and
17 environment..." Have I read that correctly so far?

18 A. Yes.

19 Q. And "environment," I think you would agree
04:45PM 20 with me that includes moisture or the elements?

21 A. These are sealed bearings.

22 Q. They're subject to outside elements, aren't
23 they? Condensation inside the bearing as a result
24 of what's going on outside, like submersion?

25 A. That would disrupt the seal. Then you'd

1 have a compromised bearing and it would have to be
2 removed from service.

3 Q. Let me continue. "...the grease in a
4 freight application will normally survive a minimum
5 of 10 years or 750,000 miles." Did I read that
6 correctly?

7 A. Yes, you did.

8 Q. Now, they're being aggressive there with
9 respect to their mileage, aren't they?

04:46PM 10 A. They are saying a minimum of 10 years and
11 they're highlighting a -- something in excess of the
12 AAR 500,000, yes.

13 Q. So that would be fairly aggressive as it
14 pertains to mileage?

15 A. Yes.

16 Q. Now, this -- this phrase that they use,
17 you -- it's your testimony that you never knew of a
18 relationship between the life of a roller bearing
19 and the life of its grease? Never heard that

04:46PM 20 before, or you heard it before in these materials?

21 A. No, if there is a failure of lubrication,
22 then the bearing fails.

23 Q. Right.

24 A. I believe what I said was that just as
25 there is no finite life to a bearing, there is no

1 finite life to its grease.

2 Q. Well, they're talking about surviving a
3 minimum of 10 years. That's -- that's double the
4 warranty that they give on their roller bearings,
5 isn't it?

6 A. And it's a minimum.

7 Q. All right. And it's not tied to the
8 mileage. You can read the sentence. It says
9 750,000 miles or -- 10 years or 750,000 miles. You
04:47PM 10 know what that "or" means; right?

11 A. It means or.

12 Q. It means hot or cold. It means laugh or
13 cry. It means right or left. It's giving you a
14 choice, isn't it? One or the other? Minimum of
15 10 years or 750,000 miles, isn't it?

16 A. It really implies that the bearing's
17 ultimate life is a function of its ongoing
18 inspection, and at some point in time a bearing will
19 show cause to have it removed from service.

04:48PM 20 Q. The longer a bearing remains in service,
21 the more likely it is to fail?

22 A. No, I would disagree with that. As -- as
23 was discussed earlier, many cars sit in storage for
24 long periods of time and you cannot make that
25 determination simply by the passage of time. It's

1 utility; it's mileage; it's environment, terrain,
2 load. That determines ultimately the condition of
3 the bearing.

4 Q. Mr. Constantino, are you telling this jury
5 that y'all disregard the statement that -- that
6 Amsted Rail and Brenco® make about survival of a
7 minimum of 10 years? Do you disregard that or do
8 you take it into account?

9 A. No, it's taken into account because the
04:49PM 10 bearing is inspected per Rule 36 and Rule 88 at
11 10 years at a maximum in our environment during the
12 qualification process.

13 Q. And those bearings, when they come in for
14 the requalification, when you get down there and
15 work with them, stamped on each end, it tells you
16 how old they are, doesn't it?

17 A. Yes, it does.

18 Q. It tells you when they went into service,
19 doesn't it?

04:49PM 20 A. It does.

21 Q. So not only do y'all have notice of this
22 survival life that comes from Brenco®, but when
23 they're requalified, there is a stamp that let's
24 those people know how long they have been in
25 service?

1 A. The Brenco® communication is a minimum time
2 period. Every time we inspect the car in our
3 facility and qualify it, it is a physical inspection
4 of the bearing, visual, if not more hands on than
5 that.

6 Q. While we're talking about notice and
7 hands-on, you read James Whelan's deposition, didn't
8 you?

9 A. Yes.

04:50PM 10 Q. And you've already testified that you read
11 the deposition of the representative of the company
12 that made this bearing; right?

13 A. Mr. Norris, yes.

14 Q. And Mr. Norris said at the time that this
15 roller bearing was manufactured that they were using
16 Shell grease.

17 A. Correct.

18 Q. It's more likely than not that Shell grease
19 was used to pack those bearings and put into the
04:50PM 20 roller journals; right?

21 A. I think "more likely than not" was his
22 words.

23 Q. And you don't have any reason to disagree
24 with that, do you?

25 A. I don't, no.

1 Q. And you saw that James Whelan looked to get
2 the specs for the Shell grease that was put into
3 those roller bearings, didn't you?

4 A. Yes.

5 Q. And he testified that based on the Shell
6 specs that they stated the Association of American
7 Railroads developed a grease specification, AAR
8 M-942, revised in 1992, which is what we were just
9 talking about, designed to eliminate field
04:51PM 10 lubrication so that they only have to grease the
11 bearings when railcars are brought to the shop for
12 wheel repair. This practice requires a grease
13 capable of performing in the bearings for hundreds
14 of thousands of kilometers or up to 10 years without
15 the need for re-lubrication.

16 Had you gotten this Shell information?

17 A. I saw that information as part of
18 Mr. Whelan's deposition.

19 Q. Did you ever take the time to go on Shell's
04:52PM 20 website to look at those product specifications for
21 yourself?

22 A. No.

23 Q. You never tried to do that?

24 A. No.

25 Q. You knew you were going to come down here

1 to Alabama -- excuse me -- to Tennessee. You were
2 going to come down here and face this jury. You
3 know that was one of the big issues in this case;
4 right?

5 A. The issue is the bearing.

6 Q. The issue of notice to Union Tank Car about
7 how long this grease is to last in those roller
8 bearings, you knew that was going to be an issue,
9 didn't you?

04:52PM 10 A. It is the issue of bearing functionality,
11 and --

12 Q. Sure.

13 A. -- whether or not there is a date limit on
14 bearing life.

15 Q. That's right. And Shell says it's
16 10 years.

17 Have you ever done anything on behalf of
18 your company to verify that one way or another?

19 MR. FLEMING: Objection, Your Honor,
04:53PM 20 argumentative and misstates that document, and we
21 don't know what Shell says because that document
22 hasn't been admitted into evidence.

23 MR. FRIEDMAN: Well, it's been read into
24 evidence and it's part of the testimony in this
25 case, Your Honor, and this is cross-examination and

1 goes to the notice of --

2 THE COURT: Reask your question.

3 BY MR. FRIEDMAN:

4 Q. Okay. Given the testimony in this case
5 before you were here and the testimony in the
6 depositions that you've read, have you done anything
7 to go on Shell's website or do any research to
8 verify whether or not the grease manufactured by
9 Shell that goes into those Brenco® bearings that are
04:53PM 10 attached to the Union tank car has a life, a maximum
11 life of 10 years, sir?

12 A. No.

13 Q. Does that -- is that important to you to
14 find out?

15 A. What is important is that Brenco® provided
16 bearings that met the AAR standard and that were
17 stated to be such that they would have a minimum
18 operating life of 500,000 miles.

19 Q. We just went over what Brenco® said.
04:54PM 20 Brenco® said minimum operating life of 10 years.

21 A. Or 750,000 miles.

22 Q. So you would --

23 A. Or kilometers.

24 Q. -- agree that age is a factor?

25 A. No, no. The AAR standard says what it

1 says.

2 Q. Well, you have knowledge of this AAR
3 standard. Would you agree that knowing what you
4 know or what you believe the AAR standard to be, it
5 would be wrong for Union Tank to put a roller
6 bearing for an unlimited period of time on its
7 tanker cars knowing that the AAR standard that's
8 being -- that -- let me stop it again. I don't want
9 to make this a long question. I want to make it
10 simple. Okay?

04:55PM

11 You've testified here today that the
12 minimum life of a wheel set or the frequency of
13 changing out a wheel set on your tankers at Union
14 Tank is seven or eight years. You did the math and
15 concluded that.

16 A. We didn't -- we didn't get to that question
17 here, but it was part of my earlier testimony that
18 if you look at roughly 52,000 wheel sets being
19 changed out in a three-year period, and given a
20 fleet size during that period of roughly 75,000
21 units, that it would work out to, on the average,
22 all the wheel sets in the fleet being changed out in
23 roughly a seven-year period.

04:55PM

24 Q. And that's -- that's on tankers. That's
25 not on all your cars, but that's specific to

1 tankers.

2 A. The vast majority of cars that we have in
3 the fleet are tank cars, yes, sir.

4 Q. So your wheels on average are getting
5 changed out every seven or eight years?

6 A. Yes, on the fleet.

7 Q. And then you've got your -- Brenco®, your
8 manufacturer, telling you, look, you can get all
9 these miles out of this, but we're saying

04:56PM 10 10 -- 10 years is the minimum that you can go on the
11 grease.

12 A. Or 750,000 miles.

13 Q. Are you telling the ladies and gentlemen of
14 the jury that it's acceptable to ignore that
15 information you get from Brenco®?

16 A. We're not ignoring that, and we're not
17 ignoring the bearing as I've talked about today.

18 Q. So --

19 A. That bearing is in service, was repeatedly
04:56PM 20 inspected by Union Tank and repeatedly inspected by
21 other members of the interchange rules while the car
22 was in service.

23 Q. So this bearing, the unit that was involved
24 in the derailment had -- the wheel set that was
25 involved in the wheel -- in the derailment, that had

1 been in operation three times the life of a typical
2 wheel set? 21 years?

3 A. Time-wise, yes. Mileage wise, no.

4 Q. So -- so it's three times longer than your
5 typical wheel set and twice the 10-year period that
6 Brenco® is talking about?

7 A. Again, Brenco® mentions minimum.

8 Q. So it's twice the minimum.

9 A. Yes.

04:57PM 10 Q. And that gives you -- and I say "you" --
11 Union Tank no cause for concern about putting that
12 tanker out there to carry something as hazardous as
13 acrylonitrile?

14 A. No, the car conformed to the rules when we
15 saw it and the car was inspected while it was in
16 interchange service, had a couple minor repairs done
17 to it by CSX after we last saw the car, and,
18 otherwise, operated unremarkably up until that last
19 day.

04:58PM 20 Q. Union Tank Car has not changed one thing
21 about the way they do business because of this
22 derailment?

23 MR. FLEMING: Objection, relevance. There
24 is no relevance to that question. There is no
25 obligation for us to change anything following this

1 incident.

2 MR. FRIEDMAN: We disagree. This goes to
3 notice of a problem both before and after.

4 THE COURT: I'm going to sustain the
5 objection.

6 BY MR. FRIEDMAN:

7 Q. Mr. Constantino, where were you last week?

8 A. I was in Chicago for part of the week. I
9 was here later in the week.

04:59PM 10 Q. But you weren't here in this courtroom?

11 A. No, sir.

12 Q. Let me go through a couple things with you
13 really quick, and I think these have been stipulated
14 to but I want to get them on the record, if I may.

15 On July 1st, 2015, the train that was
16 involved in the derailment, it was carrying nine
17 cars that were loaded with acrylonitrile?

18 A. I accept that.

19 Q. How many of those cars were Union Tank
05:00PM 20 cars; do you know?

21 A. I don't know.

22 Q. It was traveling from Cincinnati, Ohio to
23 Waycross, Georgia?

24 A. That was the last segment of its overall
25 move, yes, sir.

1 Q. The reason I brought that up is: You
2 testified that this tank -- tank car operated in the
3 midwest. That tank car operated in Georgia,
4 Tennessee, Alabama; southeastern states, didn't it?

5 A. For part of its assignment to B.P.
6 Chemicals, Innovene, INEOS, yes.

7 Q. And those were the last years of its
8 operation, not the first years?

9 A. I would agree with that, yes.

05:01PM 10 Q. 16 of the cars on the train were carrying
11 propane gas? Do you agree that 16 of the tanker
12 cars were carrying propane gas?

13 A. I understand that some number were carrying
14 propane, yes. I wouldn't dispute the number 16.

15 Q. Yeah. These were all admissions in the
16 Answer.

17 I think we've established that at the time
18 of the derailment and the time of both of the
19 qualifications, the tanker was owned by Union Tank?

05:02PM 20 A. Yes, sir.

21 Q. That the wheel set that came off was wheel
22 set No. 3 or axle No. 3? What's your understanding
23 of the wheel set that came off?

24 A. I'm just trying to --

25 Q. Do you know?

1 A. It's in the repair records. I just don't
2 want to --

3 Q. All right. Give me --

4 A. -- get trapped up between L3 and L4.

5 Q. I want to ask you briefly about some
6 requests for admissions that we filed in this case.

7 Do you agree that Union Tank Car Company
8 does not have a system for keeping up with the age
9 of roller bearings on its tank cars?

05:03PM 10 A. What we said was that we track them when
11 they're put on and monitor wheel change-outs but
12 don't necessarily track the age of the bearing put
13 on during a wheel exchange.

14 MR. FRIEDMAN: Go to paragraph 30.

15 BY MR. FRIEDMAN:

16 Q. I think this is a little more succinct.
17 This is the Answer to the Complaint.

18 A. No, I agree with that.

19 Q. Do you see that? "UTC does not have a
05:04PM 20 system for keeping up with the age of roller
21 bearings on tank cars." Do you --

22 A. For systematically tracking the age of
23 roller bearings on its tank cars.

24 MR. FRIEDMAN: Bring up 138, if you would.

25

1 BY MR. FRIEDMAN:

2 Q. "Union Tank Car has no knowledge of how
3 often its bearings fail on its tank cars or the
4 reasons for the bearing failures." Do you agree
5 with that?

6 MR. FLEMING: Your Honor, is he showing him
7 a document that says this --

8 MR. FRIEDMAN: Yes.

9 MR. FLEMING: -- or is he just asking him
05:04PM 10 that question, because this is just an Answer?

11 MR. FRIEDMAN: Paragraph 31.

12 MR. FLEMING: Thank you.

13 BY MR. FRIEDMAN:

14 Q. 31. Do you see that? Do you see that,
15 sir?

16 A. Yes. And it says -- our Answer says, "We
17 admit that it does not have a system for tracking
18 bearing failures on its tank cars but to the
19 extent" --

05:05PM 20 Q. Are you reading now?

21 A. Yes.

22 Q. Continue. Please continue.

23 A. -- "the allegation alleges or implies in
24 any way that UTC is liable or responsible, it is
25 specifically denied." And I don't have to read the

1 rest of it.

2 Q. Sure. That's kind of legal language. But
3 just to --

4 A. That's correct.

5 Q. -- the extent that this issue is decided
6 here, UTC admits that it does not have a system for
7 tracking bearing failures on its tank cars; do you
8 agree with that?

9 A. Tracking -- tracking wheel change-outs,
05:05PM 10 yes.

11 Q. Roller bearing --

12 A. Roller bearing failures, no.

13 MR. FRIEDMAN: I want to make sure that we
14 have the lease put into evidence. And I believe you
15 were asked a question about that. I've got to find
16 my copy. Do you have a copy of the lease?

17 (Plaintiffs' Exhibit 48 was
18 marked/received into evidence.)

19 BY MR. FRIEDMAN:

05:06PM 20 Q. This is Exhibit 48. There is no objection
21 to it. You've seen this before, haven't you, sir?

22 A. Yes, I have.

23 Q. And you corrected me before when we were
24 talking about lessor and lessee. Union Tank Car was
25 the lessor of the tank at the time of the

1 derailment?

2 A. Yes, sir.

3 Q. And there is a section in the lease that
4 designates maintenance, and I'm going to draw your
5 attention to that. I believe it's Section 2.03. Do
6 you see that, Maintenance of Cars?

7 A. Yes, sir.

8 Q. Now, just so we understand this lease, the
9 company that's leasing the tanker, they pay you a
05:07PM 10 monthly fee for that; right?

11 A. That's correct, they do.

12 Q. And out of that fee you guys pay all the
13 taxes; right?

14 A. Yes.

15 Q. And you make any other payments that are
16 necessary for the operation of the tanker; correct?

17 A. Maintenance administration and car taxes,
18 yes, sir.

19 Q. You keep up with all the paperwork?

05:07PM 20 A. Yes, sir.

21 Q. And then this Section 2.03, Maintenance of
22 Cars -- first of all, you mentioned in your
23 deposition, and I think it kind of succinctly
24 describes this lease, and I don't want to risk
25 misquoting you again, but you call it a full-service

1 lease?

2 A. Yes, and I mentioned that earlier today,
3 also.

4 Q. Okay. And in this full-service lease, this
5 is the responsibility for maintenance that is
6 accepted by Union Tank Car?

7 A. And it is a division of responsibilities
8 for maintenance articulated in the lease, yes.

9 Q. Not- -- notwithstanding any lease agreement
05:08PM 10 where things are decided as to how responsibilities
11 would be distributed, the qualification issue is
12 something under the law that is nondelegable; that
13 is, solely the responsibility of Union Tank Car, is
14 it not?

15 A. As car owner, yes.

16 Q. Right.

17 MR. FRIEDMAN: Thank you. That's all the
18 questions I have.

19 THE COURT: Thank you. Redirect?

05:09PM 20 MR. FLEMING: Can I have the ELMO, please.

21 REDIRECT EXAMINATION

22 BY MR. FLEMING:

23 Q. Mr. Constantino, on cross-examination,
24 Mr. Friedman asked you a question about the 2004
25 qualification records and whether or not they had

1 them when you were deposed. Do you recall that
2 testimony?

3 A. Yes, sir.

4 Q. Do you recall being deposed in this case?

5 A. Yes.

6 Q. Do you recall being deposed?

7 A. Yes.

8 Q. When were you deposed?

9 A. August 30th, 2017.

05:09PM 10 Q. And is the document I have on the ELMO a
11 copy of your deposition?

12 A. It is.

13 Q. And I want to turn to the -- page 3 that
14 lists the exhibits from your deposition. I want to
15 draw your attention to Exhibit No. 5. What is
16 Exhibit No. 5?

17 A. Rule 88.b-2 (sic) inspection from March
18 2nd, 2004.

19 Q. And is the Rule 88.b.2 inspection from
05:10PM 20 March 2nd, 2004 the document that was produced by
21 Union Tank Car as part of the qualification file?

22 A. Yes.

23 MR. FLEMING: And if you could change to
24 Exhibit 87, please. Can we switch over?

25

1 BY MR. FLEMING:

2 Q. And this is Union Tank Car's Exhibit 87,
3 and if you'll expand on the deposition exhibit. We
4 talked about Exhibit 87 earlier. Is Exhibit 87
5 Exhibit 5 to your deposition, sir?

6 A. It is. It is so marked.

7 MR. FLEMING: And if you would reduce that.

8 BY MR. FLEMING:

9 Q. Does that help you recall that plaintiffs
05:10PM 10 did, in fact, have and questioned you on documents
11 from the qualification from 2004?

12 A. That's obviously correct, yes.

13 Q. You had asked Mr. Friedman --

14 MR. FLEMING: And if I could go back to the
15 ELMO.

16 BY MR. FLEMING:

17 Q. -- while he was asking you about the
18 Brenco® Installation and Maintenance Guide whether
19 you could start with page 2. Do you recall that
05:11PM 20 testimony?

21 A. Yes.

22 Q. I wanted to give you an opportunity to tell
23 the jury what it is from -- and I'm showing you
24 Exhibit 15 of plaintiffs.

25 A. That is -- that is the page that I

1 was -- well --

2 Q. Was page 2 the page you wished to discuss
3 or draw --

4 A. I wanted to --

5 Q. -- attention to?

6 A. I wanted to highlight something on page 1,
7 also.

8 Q. Hang on one second.

9 A. Well, the --

05:11PM 10 Q. No, I'll bring it. This is page 1.

11 A. The -- the -- the fact that -- what I
12 wanted to highlight is, again, this is a brochure,
13 but specifically it is calling out that what is
14 contained within the brochure are -- A, are class
15 bearings pursuant to certificates 5A and 2B at -- or
16 28 as issued by the AAR to Brenco® allowing them to
17 market certified AAR-approved bearings in commerce
18 for applications to railroads.

19 Q. Does the second page of this document also
05:12PM 20 provide a disclaimer? Can you see that enough?

21 A. Well, in addition, any internal bearing
22 reconditioning work is to be carried out by an
23 approved reconditioning shop in accordance with AAR
24 standards and recommended practices, and that's
25 exactly what my testimony this afternoon has been.

1 Q. Now, earlier we talked about and plaintiffs
2 talked with you briefly or in some detail about the
3 insulation project, and previously I attempted to
4 ask you about a letter, the project memo that was
5 issued in November of 1996. Do you recall a memo
6 being drafted and circulated?

7 A. I do recall the initial discussions about
8 the developing data that was coming up. That was
9 between Joe Perez, an individual named Rick Koenig
05:13PM 10 and myself, and that led to a determination that a
11 company repair project should be established and
12 that our repair shops should receive instructions on
13 putting drain holes along the bottom centerline of
14 our cars, insulated cars.

15 MR. FLEMING: Can I use the ELMO just for
16 the witness.

17 THE COURTROOM DEPUTY: Thank you.

18 BY MR. FLEMING:

19 Q. I want to show you just to ask you some
05:14PM 20 foundational questions. Is the document that I've
21 put in front of you the memo that you guys -- that
22 you and your -- that you found in preparation for
23 today?

24 A. Yes, sir.

25 Q. And were you a recipient of this memo as

1 indicated on page 2?

2 A. I was.

3 Q. So, in 1996, you were a recipient of the
4 project memo?

5 A. Yes.

6 MR. FLEMING: Your Honor, this is a
7 business record that I would move for admission and
8 publication to the jury.

9 THE COURT: Any objections?

05:15PM 10 MR. FRIEDMAN: It was never produced.

11 MR. FLEMING: Again, Your Honor, this
12 information -- the qualification file was in their
13 possession. They didn't raise the issue of
14 insulation at any time before the opening statement.
15 We were given no notice that this would be at issue
16 in this case and we found this letter. It's a
17 business record. There is no prejudice. They have
18 had an opportunity to review it and ask any
19 questions they have.

05:15PM 20 THE COURT: All right. So this particular
21 document has not been produced, but you're asking to
22 admit it into evidence based upon the opening
23 statement or based upon the questions of
24 cross-examination?

25 MR. FLEMING: Correct.

1 THE COURT: What's your response to that?

2 MR. FRIEDMAN: My response is: The issue
3 of these tanker cars being wet and causing the
4 roller bearings to fail has been in this case
5 from -- for months and months, and we -- this is
6 a -- it's got -- Your Honor, it's late in the day,
7 and in the interest of cooperation, I'll withdraw my
8 objection.

9 THE COURT: All right.

05:16PM 10 MR. FRIEDMAN: Thank you. So we can move.

11 THE COURTROOM DEPUTY: What number is it?

12 MR. FLEMING: 148. I'm sorry. 149.

13 (Defendant's Exhibit 149 was
14 marked/received into evidence.)

15 BY MR. FLEMING:

16 Q. And just to recall, the water that was at
17 issue for the insulation, that was water from the
18 atmosphere as opposed to water from any sort of
19 flood or submersion?

05:16PM 20 A. Correct, yes. Humidity and the heating and
21 cooling cycles and condensating atmospheric moisture
22 inside the jacket.

23 Q. And this was insulation that, as you just
24 pointed out, was inside the jacket?

25 A. That's correct, yes.

1 Q. And was the corrosion that you were
2 discussing with Mr. Friedman corrosion that could
3 occur on the interior of the jacket and that's the
4 reason for the project, to eliminate that risk?

5 A. It could have -- it would have been present
6 in the jacket anulus between the tank and the jacket
7 itself, and we wanted that water to evacuate and not
8 be a risk.

9 Q. Did that water pose any risk to the trucks
05:17PM 10 or roller bearings at issue in this litigation?

11 A. No. The drain holes to be inserted were at
12 three locations along the bottom centerline of the
13 car, and all three locations are outside of the
14 wheel and axle sets for either end of the car.

15 Q. Finally, Mr. Friedman had said that -- or
16 he showed you and read from the FRA summary report.
17 He read some of the FRA actions to be taken for
18 field guidance. Do you recall that?

19 A. Yes, sir.

05:18PM 20 Q. And one of them was to look at the history
21 of the car to determine whether there is any
22 evidence of submersion or flood. Do you remember
23 that?

24 A. Yes.

25 Q. And did you, sir, review the car history to

1 determine there was no evidence of any submersion or
2 flood in the history of this car?

3 A. I reviewed the car history going back to
4 construction. There is no commentary, evidence,
5 repair history that would suggest it was ever
6 submerged.

7 MR. FLEMING: Your witness.

8 THE COURT: Any recross?

9 MR. FRIEDMAN: No, Your Honor.

05:18PM 10 THE COURT: All right. Thank you,
11 Mr. Constantino, you may be excused.

12 (Which were all the proceedings
13 requested to be transcribed at
14 this time.)

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C-E-R-T-I-F-I-C-A-T-E

STATE OF TENNESSEE

COUNTY OF KNOX

I, Teresa S. Grandchamp, RMR, CRR, do hereby certify that I reported in machine shorthand the above excerpt report of proceedings, that the said witness(es) was/were duly sworn; that the foregoing pages were transcribed under my personal supervision and constitute a true and accurate record of the proceedings.

I further certify that I am not an attorney or counsel of any of the parties, nor an employee or relative of any attorney or counsel connected with the action, nor financially interested in the action.

Transcript completed and signed on Friday, January 4, 2019.

TERESA S. GRANDCHAMP, RMR, CRR
Official Court Reporter